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A Moral Psychological Primary Source Analysis of *Brown v. Board of Education*

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A Moral Psychological Primary Source Analysis of *Brown v. Board of Education*

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Abstract

A Moral Psychological Primary Source Analysis of *Brown v. Board of Education*

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This work applies the social intuitionist psychological model of moral judgment to explain the U.S. Supreme Court's *Brown v. Board of Education* (1954) decision-making process. Based on an examination of the available *Brown* primary source material——conference notes, interchamber and private memoranda, missives to private individuals, written brainstorms, and clerk recollections——this work argues that most of the justices' decision-making in *Brown* is captured by the model and associated psychological phenomena. The analysis clarifies *Brown*'s constitutional holding and the nature of the constitutional violation and harm the justices intended to proscribe. The work concludes that *Brown* has a consequentialist, not a deontological or colorblind, provenance and purpose.

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Chapter 1. Introduction

On May 17, 1954, in *Brown v. Board of Education*,[1] the United States Supreme Court unanimously ruled that legally compelled racial segregation violates the Equal Protection Clause of the Fourteenth Amendment. On the same day, in the companion case of *Bolling v. Sharpe*,[2] the Court held that enforced racial segregation was also a violation of the Due Process Clause of the Fifth Amendment. At the time, segregation was implicitly authorized by Congress in its plenary governance of Washington, D.C., and either required or permitted by law in seventeen states—— all either former members of the Confederacy, or (with the exception of Wyoming) so-called Border States with sizeable populations of African Americans. In declaring that the "separate but equal" doctrine of *Plessy v. Ferguson*[3] was not applicable to public education, *Brown* represented the turning point in the Supreme Court's equal protection jurisprudence. Though the Court declined to overrule *Plessy* explicitly in *Brown*, its May 17 decision was the beginning of the end for federal judicial toleration of state and national legislative action that stigmatized, subordinated, or otherwise burdened racial minorities.

Brown refers to four cases that were consolidated and argued before the Court over the course of three terms.[4] Those cases are *Brown v. Board of Education of Topeka* (Kansas), *Gebhart v. Belton* (Delaware), *Davis v. County School Board* (Virginia), *Briggs v. Elliott* (South Carolina). In each of these cases, black plaintiffs challenged state laws that (in Delaware, Virginia, and South Carolina) required, or (in Kansas) permitted, racial segregation in the public schools. *Bolling v. Sharpe* arose out of a challenge to the policy of the school board of the District of Columbia, dating

[1] 347 U.S. 483 (1954).
[2] 347 U.S. 497 (1954).
[3] 163 U.S. 537 (1896).
[4] October Terms (OTs) 1952-1954.

back to 1865, to require segregation in D.C. public schools. All five cases were financed, staffed, and superintended by the National Association for the Advancement of Colored People (NAACP). Because the Fifth Amendment constrains action by the federal government, and the Fourteenth Amendment was understood at the time to constrain only action by state governments, the NAACP's lines of constitutional attack differed for the two cases. The NAACP challenge to segregation in the states was predicated upon the Equal Protection Clause of the Fourteenth Amendment, ratified in 1868; that to segregation in D.C., on the Due Process Clause of the Fifth Amendment, ratified in 1791.

Prior to the first round of oral arguments, in addition to its standard legal briefs arguing the constitutional merits, the NAACP filed a brief signed by 32 academics that purported to summarize the academic consensus on the sociological and psychological effects on blacks of enforced segregation. At the first round of oral arguments in December 1952, Thurgood Marshall, as attorney for the plaintiffs in the South Carolina case, argued that the Court need not overturn *Plessy* in order to afford his clients relief. The Court, Marshall said, could find for the appellants in the D.C., Kansas, Virginia and South Carolina cases, and for the appellee in *Gebhart* (the NAACP had prevailed before both the Delaware trial court and state Supreme Court) by adopting one of three rationales. First, the Court could invoke and extend the logic of the recently decided graduate and professional school cases, *Sweatt v. Painter*[5] and *McLaurin v. Oklahoma*,[6] to primary and secondary public schools. Second, the Court could rule that racial classifications do not have a rational relationship to a legitimate public purpose (what is today known as rational basis scrutiny). Or,

[5] 339 U.S. 629 (1950).
[6] 339 U.S. 637 (1950).

third, the Court could find that racial classifications are inherently "invidious" (i.e., adopt a deontological rational invalidating state action based on race *per se*).[7] The Court ultimately eschewed all three possibilities.

The *Brown* litigation was heard three times before the Court. The Court heard arguments on the merits twice and on the remedy once. The first merits hearing took place over three days from Tuesday, December 9, to Thursday, December 11, 1952, and the justices met at their weekly Saturday conference to discuss the cases on Saturday, December 13. I will refer to this meeting as the first *Brown* conference on the merits. At a conference on May 29 of the following year, the justices agreed to order reargument in the cases rather than decide on the merits. On June 8, 1953, in lieu of issuing a decision in *Brown* or *Bolling*, the Court issued the following order.

> NO. 8. BROWN ET AL. V. BOARD OF EDUCATION OF TOPEKA ET AL.;
>
> NO. 101. BRIGGS ET AL. V. ELLIOTT ET AL., MEMBERS OF BOARD, OF TRUSTEES OF SCHOOL DISTRICT #22, ET AL.;
>
> NO. 191. DAVIS ET AL. V. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY ET AL.;
>
> NO. 413. BOLLING ET AL. V. SHARPE ET AL.; AND
>
> NO. 448. GEBHART ET AL. V. BELTON ET AL.
>
> Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:
>
> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not

[7] Friedman ([1969] 2004, 45).

contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
   (a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
   (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?
4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
   (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
   (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in this case;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decree;

(d) should this Court remand to the courts of first instance with directions to frame decrees in this case and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Attorney General of the United States in invited to take part in the oral argument and to file an additional brief if he so desires.[8]

In accordance with the last sentence of the order, sometime in July, the Solicitor General's office of the nascent Eisenhower administration began drafting briefs of its position in the litigation and reached out to Chief Justice Vinson to request more time to prepare. Acting unilaterally, on August 4 Vinson granted the request and moved the rehearings from October 12 to December 7. On September 8, Vinson, who had led the first *Brown* conference on the merits, died unexpectedly. By recess appointment, President Eisenhower appointed California Governor Earl Warren to replace Vinson as Chief Justice of the United States on October 5, 1953. The second round of *Brown* oral arguments on the merits took place, as rescheduled by the former Chief Justice, from Monday, December 7 to Wednesday, December 9. The justices met on Saturday, December 12 to discuss the cases. I will refer to this meeting as the second *Brown* conference on the merits. Chief Justice Warren was confirmed by the Senate on March 1, 1954. On May 17, 1954, the Court issued its

[8] 345 U.S. 972 (1953).

decision on the constitutional merits in *Brown* and *Bolling* and ordered a third round of arguments on the remedy, specifically on question numbers 4 and 5 of the June 8, 1953 rehearing order.

The cases were restored to the docket for the October Term 1954. On October 9, Justice Robert Jackson died of a second heart attack, his first having come on March 30, and incapacitating him for much of the end of the *Brown* merits decision-making process. President Eisenhower nominated John Marshal Harlan, II——grandson and namesake of the sole dissenter in *Plessy*——to the Court as Jackson's replacement on January 13, 1955, and the Senate confirmed him on February 9. The Court heard arguments on the *Brown* and *Bolling* remedy from Monday, April 11 to Thursday, April 14, and met to discuss the cases on Saturday, April 16. The Court issued its remedy decision in a unanimous opinion on May 31, 1955. To distinguish the Court's two decisions, the decision on the merits is sometimes called *Brown I*, and the decision on the remedy is always called *Brown II*. Unless I specify otherwise, however, "*Brown*" will refer to the decision on the merits. I will always refer to the decision on the remedy as *Brown II*.

The Supreme Court in *Brown* held that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities[.]" The Court's dispositive reasoning in so ruling was as follows: "To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone." The Court also distinguished *Plessy* without overruling it. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, th[e] finding" that segrega-

tion "generates a feeling of inferiority" that harms blacks "is amply supported by modern authority." This last statement was followed by a footnote, Footnote 11, which referenced five of the social science studies broached in the NAACP's 1952 sociological brief.[9]

Though *Brown* was welcomed, even exalted, in many parts of the country, its constitutional rationale was soon criticized by legal scholars who nonetheless agreed with its outcome. Perhaps the most famous example was Harvard Law professor Herbert Wechsler, who, five years after *Brown*, questioned the decision's reasoning.

> Does the validity of the decision turn then on the sufficiency of evidence or of judicial notice to sustain a finding that the separation harms the Negro children who may be involved? … And if the harm that segregation worked was relevant, what of the benefits that it entailed: sense of security, the absence of hostility? Were they irrelevant? . . . Suppose that more Negroes in a community preferred separation than opposed it? Would that be relevant to whether they were hurt or aided by segregation as opposed to integration? . . . I find it hard to think the judgment really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved. For many who support the Court's decision this assuredly is the decisive ground.[10]

Instead of basing the opinion on a strained reading of the Equal Protection Clause, Wechsler would have predicated the decision on the claim that the arbitrary denial of freedom inherent in enforced racial segregation amounted to a denial of due process.

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[9] 347 U.S. 483 (1954), at 493-494.
[10] Wechsler (1959), at 32-33.

Philip Kurland was another critic of *Brown*'s reasoning. Yet he also pithily captured why the case, despite its ostensibly shoddy constitutional reasoning and apparent concern only with racial segregation in public schools, was so significant in the realm of constitutional law.

> "*Brown v. Board of Education* was the beginning" because it wiped clean the slate. It enabled the Court to write its own code of equality in substitution for the equal protection clause which, as late as the time of Mr. Justice Holmes, was regarded as the last resort of desperate litigants. Professor [Laurence] Tribe's text on constitutional law describes "the model of equal protection," almost all of which is based on judicial manufacture since Brown.[11]

Regarding the weakness of *Brown*'s judicial reasoning, Kurland contended:

> "Brown v. Board of Education was the beginning," but not of new constitutional doctrine or, if a beginning of constitutional doctrine, only the merest adumbration of it. The opinion affords no principle on which to build. There is only the factual proposition that compulsory separation of the races in public schools is detrimental to black children because it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." That conclusion need not be questioned except to note that the opinion's statement of the result is far clearer than its proof.… The logical proposition in support of an equality argument that may be derived from the language of the Court is: (1) adequate schooling can be afforded only in classrooms that contain students of the white majority; (2) white majority students are free to participate in schooling with other white majority students, but black minority students are precluded by

[11] Kurland (1979a, 316). Internal citations omitted.

> state law or constitution from sharing such schooling with whites; therefore, (3) black students are deprived of equal educational opportunity. The major premise, of course, has never been established and remains the subject of much controversy among scholars of many disciplines. Whatever one feels about the conclusion reached by the Court … the opinion was a shabby, disingenuous way of disposing of some of the most consequential cases before the Supreme Court since *Dred Scott*. It has been excused largely on the ground that the opinion was the result of desperate negotiations aimed at assuring unanimity rather than clarity. Most committee efforts bear the stigmata of compromise. Certainly, majority Supreme Court opinions frequently do, and not least in cases of great social consequence, when unanimity must be regarded as "a miracle of rare device."[12]

So enduring and profound has been the scholarly discontent with *Brown*'s "shabby, disingenuous" constitutional reasoning that at the turn of the century some of the nation's elite law scholars and constitutional lawyers individually took a stab at rewriting *Brown*. Their historical-counterfactual judicial opinions were published in a tome entitled, *What* Brown v. Board of Education *Should Have Said*.[13]

This work attempts to answer two questions. The first is, Why did the *Brown* decision lack a robust and generalizable theory of equal protection and refrain from articulating the specific constitutional rights that segregation violated? The second is, What constitutional harms does *Brown* condemn? Studies of *Brown* in the law and political science literatures tend to address these questions only indirectly. Such partial answers as presently exist point to Warren's stated objectives in writing the *Brown* decision and to the effect of the pursuit of unanimity among the justices

[12] Id., at 317.
[13] Balkin (ed.) (2001).

on the decision-making process. These answers do not, however, adequately explain why the justices with jurisprudential philosophies to which the final *Brown* opinion, light as it was on the traditional elements of judicial reasoning, would seem to have been anathema, joined Warren's final opinion. Nor do the available accounts posit or identify any causal linkages between the justices' individual decision-making processes and the reasoning of Warren's final opinion. Finally, most studies of the *Brown* decision-making process do not aim to clarify the decision's holding as a precedent for future judicial action. In my view, ascertaining *Brown*'s legal meaning is of the utmost constitutional and practical importance and is not merely an academic question of primarily theoretical or epistemic utility. *Brown* began the modern equal protection regime, but it did not clearly explain in what that regime would consist, other than indicating that that regime would improve situation of racial minorities. Notwithstanding Kurland's attempts to clarify the decision's basis (which had been refracted through and perhaps distorted by a quarter century of subsequent judicial rule-manufacture), *Brown* did not espouse an obvious constitutional theory concerning racial discrimination that could be generalized to future cases, whether in desegregation or other areas of equal protection. It did not identify the constitutional harm in racial discrimination generally, and the harms it did impute to segregation specifically were both controvertible and controverted at the time.[14] Nor did the Court articulate the individual constitutional rights——rights that the Court, only four years before, had in *McLaurin v. Oklahoma* declared to be "personal and present"[15]——that segregation in primary and secondary school presumably violated as well.

[14] Cf. Cahn (1955), Hand (1958), Wechsler (1959).
[15] 339 U.S. 637 (1950), at 635.

LITERATURE REVIEW

The most widely read and popular account of the *Brown* decision-making process is Richard Kluger's *Simple Justice*.[16] Kluger's book is an exhaustive summary of the background and history of each of the five segregation cases, including, where relevant, the stories and backgrounds of key personages in the *Brown* drama, and includes in its last 150 pages a thorough presentation of much, although not all, of the *Brown* primary source materials that form the object of my own research and interpretative analysis. Kluger, a journalist, aims more to tell the story of the *Brown* decision-making process than to explain it, and his work is useful as a reference for both primary source information and original, historically-bounded secondary research, such as interviews with key participants in the *Brown* litigation who have passed since the book's publication. However, Kluger's magisterial work is not free of shortcomings. The most important of these is that Kluger does not attempt to explain, at any deep causal level beyond the justices' own accounting of their decision-making, why the justices behaved the way they did, or to explore how those behaviors affected the eventual constitutional holding in *Brown*. Accordingly, while my research surveys much of the same materials as Kluger, it does so in order to reconcile and explain the justices' decision-making with an overarching theory of judicial behavior. A second shortcoming of Kluger's work was well articulated by Dennis Hutchinson, who, writing a few short years after Kluger, observed:

> Even for its wealth of illuminating detail, *Simple Justice* cannot be denominated the definitive account of the decision-making process in the *Brown* cases. The book's limitations are attributable to what one reviewer has called the "reductive" nature of the chronicle: the

[16] Kluger ([1976] 2004).

> account "is so weighted with the knowledge of what eventually prevailed that the reader finds it hard to keep any flavor of the issues and risks that faced litigants and judges before May 17, 1954."[17]

To that observation I add that Kluger's narrative has the feel more of hagiography than history. It does not approximate, by any means, a neutral or tonally even-handed exposition of the events that culminated in the Court's *Brown* decision. Kluger's narrative is in this respect a representative example of the common conception among scholars of *Brown* as the Court's finest hour and greatest moral triumph. One virtue of my work, in contrast, is that it does not approach *Brown* from such an obvious position of celebration and exaltation, but from a desire to understand and explain.

Hutchinson also deprecates Kluger's over-emphasis of Earl Warren's arrival and leadership in narrating the final outcome of the *Brown* decision-making process. "The Court is made to appear tangled in a political and doctrinal Gordian Knot one Term, only to be delivered by the master stroke of one man——in this instance, Earl Warren——the next." Hutchinson accepts that Warren's leadership played a role in the *Brown* outcome but suggests that the role of no justice, nor that of any group of justices, can alone account for the *Brown* outcome.

> Over forty years ago, Felix Frankfurter, then a law professor, warned against characterizing decision-making in the Supreme Court in such a fashion: "The reduction of history to the efforts of a very few personalities is an expression of the ineradicable romantic element in man. We want to dramatize life, and also to simplify it." Despite vastly richer data, it is no easier now to "disentangle individual influences in the combined work of a Court" than it was when Frankfurter wrote in 1937.[18]

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[17] Hutchinson (1980).
[18] Id., at 34. Internal citations omitted.

Two ways in which my work remedies this problem is by identifying the effects of the justices' social milieu upon the inputs to their judicial decision-making, and by highlighting common features in the justices' individual *Brown* decision-making processes. History might be more than "the efforts of a very few personalities," but historical causality can nevertheless be, in part, illuminated through an examination of those personalities.

A refinement of Kluger's account is Dennis Hutchinson's work on the *Brown* decision-making process.[19] Hutchinson contends that the justices' pursuit of unanimity in the desegregation cases defines and explains the content of those decisions, including the ambiguities in *Brown* and the Court's confrontation with high-profile non-compliance, as in the Little Rock integration crisis and the justices' subsequent decision in *Cooper v. Aaron*.[20] In his own words, Hutchinson

> tell[s] the story of the rise and fall of unanimity from 1948 to1958 from the perspective of the judges who were faced with 'the greatest issue any of them had met or [were] likely ever to meet." The story is not only one of the influence of personality on the decision-making process, as is so often assumed, but of the dominance of ideas and doctrine as well. It is also the story of the balance sometimes struck by the members of the Supreme Court between the particular requirements of the cases with which they were presented and the capacity of the Court as an institution to address explosive social issues presented in those cases. Great cases strain not only the law but also the position and effectiveness of the Supreme Court.[21]

Insofar as this is his purpose, Hutchinson succeeds. Indeed, the evidence he presents proves that unanimity was a conscious goal of both Warren and Frankfurter in the *Brown* decision-making

[19] Hutchinson (1980).
[20] 313 U.S. 1 (1958).
[21] Hutchinson (1980, 3-4). Internal citations omitted.

process, that Warren used appeals to institutional unity to convince Justice Stanley Reed to join the other eight justices in overturning segregation, and, "[o]nce established in 1954, unanimity ceased to be merely a desirable value; it became a routine practice."[22] Moreover, Hutchinson reports upon primary source evidence taken from the justices' papers for *Shelley v. Kraemer*,[23] *Henderson v. United States,*[24] and the aforementioned *Sweatt* and *McLaurin*, showing that the justices had long been exposed to and considering arguments——including sociological and moral arguments——for ending not only segregation but all forms of racial discrimination.[25]

Hutchinson does not, however, adduce any proof that any of the justices had, at some point over the course of those cases, decided that segregation *per se* was unconstitutional. What we learn from Hutchinson's review of those case materials is instead consistent with the model of judicial behavior I will postulate as largely controlling in *Brown*. With respect to such approaches, Hutchinson acknowledges that his purpose is not "to evaluate the evidence presented against models or theories of judicial decision-making. My limited concern is to help fill part of the evidentiary gap that has flawed attempts at theoretical models of adjudication."[26] My work, in turn, establishes that the evidence Hutchinson adduces both in and before *Brown* better fits a particular model of judicial decision-making and that that model explains Hutchinson's evidence better than some of his theoretically agnostic analysis.

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[22] Id., at 3.
[23] 334 U.S. 1 (1948) [ruling that court enforcement of racially restrictive covenants was discriminatory state action and therefore unconstitutional].
[24] 339 U.S. 816 (1950) [construing the Interstate Commerce Act's requirement that railway service providers not "subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" to prohibit racial segregation in railway cars].
[25] Hutchinson (1980, 4-30).
[26] Id., at 4, fn 12.

For instance, Hutchinson interprets Frankfurter's comments at the second *Brown* merits conference as "focus[ing] on the tone and manner with which" the Court should overturn segregation as a result of the justice's realization "that a majority of the Court was prepared to hold segregation unconstitutional."[27] My analysis will show that this presentation of Frankfurter's conference comments is empirically mistaken and that Hutchinson's interpretation of the justice's comments misunderstands Frankfurter's position on *Brown* as of December 12, 1953. Relatedly, Hutchinson construes the justices' failure to discuss the legislative history of the Fourteenth Amendment at the second *Brown* conference as a "victim, in large measure," of Alexander Bickel's memo on the legislative history of the Amendment. Hutchinson notes that Frankfurter had circulated Bickel's memo to the other justices with a cover memo contending that "the research was 'inconclusive in the sense that the Congress as an enacting body neither manifested that the amendment outlawed segregation to that end, nor that it manifested the opposite,'"[28] and suggests that the Bickel memo put to bed the justices' qualms about the history. As my analysis will demonstrate, not only did Bickel's memo fail to assuage completely Frankfurter's own concerns about the role that the history of the Amendment should play in any decision, but also at least two of the other justices (Jackson and Clark, with Douglas a possible third) did *not* agree with the proposition that the history was "inconclusive" as to segregation or racial discrimination. Finally, I offer a model of judicial behavior that can better unify and explain the historical evidence than does Hutchinson.

Bernard Schwartz, in his judicial biography of Chief Justice Earl Warren,[29] provides a summary of additional primary source materials from the *Brown* decision-making process and incisive

[27] Id., at 39.
[28] Id., at 40.
[29] Schwartz (1983).

interpretative analysis that largely coheres with the model of judicial behavior by which I try to explain *Brown*. I incorporate selections of Schwartz's analysis into appropriate places in my own. I make particularly extensive use of his interpretations of Warren's comments at the 1953 conference and his reporting of Warren's opinion-writing method and Warren's overall persuasion strategy throughout the *Brown* decision-making process. While most of Schwartz's work pertains to the Court's major post-*Brown* cases decided during Warren's tenure, enough of the book is devoted to *Brown* primary source material and analysis to make the work a major contribution to understanding what transpired in the case, especially given Warren's central role in fomenting unanimity among his colleagues and in writing the *Brown* opinion.

Mark Tushnet and Katya Lezin[30] provide a summary and re-interpretation of the *Brown* primary source materials that make their work closer to my own than any other in the *Brown* literature. Tushnet and Lezin review the "standard narrative" of *Brown* and conclude that it does not adequately or accurately explain Frankfurter's behavior. That narrative, presented most clearly in Kluger, holds that Frankfurter "saved" the Court from a self-inflicted wound of deciding on the merits in the October 1952 term, when the opinion would have come down with the justices closely divided. Frankfurter spared the Court this "catastrophic" outcome by convincing his colleagues to re-hear the cases in 1953. Frankfurter's motive in requesting delay was to buy the justices time to coalesce around a common outcome. Vinson's death and Warren's serendipitous ascension to the Court in fall of 1953 afforded Frankfurter an unexpected new ally in fomenting unanimity, and after the *Brown* rehearings Warren and Frankfurter together succeeded in that goal.

Tushnet and Lezin argue that this tidy story masks Frankfurter's own profound (and never judicially resolved) struggle over *Brown*, likely misstates his motivations, and was in fact his own

[30] Tushnet and Lezin (1991).

handiwork. Frankfurter, they claim, requested reargument on the history of the Fourteenth Amendment because he could not persuade himself to vote to invalidate segregation in the state cases. He wanted to buy time primarily so that he could reconcile his judicial views to the outcome he favored morally, not so that the Brethren would have more time to coalesce around a common outcome. After all, no one could have foreseen, before the next term, the passing of Vinson, who along with Reed had spoken out unequivocally in favor of sustaining segregation at the first *Brown* conference. Moreover, Tushnet and Lezin argue that Jackson's comments at both *Brown* conferences posed a serious problem for Frankfurter by highlighting the necessarily "political" nature of, and the lack of an appropriate "judicial" rationale for, any decision invalidating segregation. Frankfurter apparently internalized this challenge but never failed to meet it adequately. In other words, Frankfurter failed in his attempt to reconcile his judicial to his moral views on segregation. Tushnet and Lezin suggest instead that Frankfurter shifted his focus to the remedy portion of the case, which provided him with technical legal material into which he could "sink his teeth" and thus feel as though he had reached an adequate "judicial" decision on the merits. The "story" about Frankfurter seeking delay with the foresight that it would produce a unanimous court was peddled by Frankfurter to the other justices, his clerks, and friends like Judge Learned Hand, as a post hoc rationalization of what had simply been an effort to buy time in which to discover or develop an acceptable judicial rationale for a "congenial political conclusion," to use Jackson's expression. Tushnet and Lezin conclude, however, that Frankfurter never succeeded in doing so.

In my view, Tushnet and Lezin's interpretation is an improvement on Kluger's account of some of the central events of the *Brown* decision-making process. But, as my work will show, their account can be refined as well. For instance, while Tushnet and Levin are probably correct that Frankfurter sought time to work out his own views, it is also entirely possible that he wanted, as

he claimed, to buy time in the hopes of a less divided outcome the following term——there is certainly no proof against this interpretation. My analysis will suggest, additionally, that Frankfurter's primary motivation in holding the cases over for reargument was to find, whether by the historical materials dredged up in reargument or by Bickel's research project, a historical "smoking gun" that showed *Plessy* had been a mistaken interpretation of the equal protection clause of the Fourteenth Amendment the day it was decided. When that proof failed to materialize, and when indeed proof for precisely the opposite position emerged in the late summer and fall of 1953, the evidence suggests that Frankfurter neutralized the Amendment's history by declaring it "inconclusive." He then proceeded to reconcile his judicial views (though he had to stretch them almost to the breaking point) to his moral ones on the merits before turning to the remedy portion of the litigation.

Michael Klarman's book, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*,[31] is also a precursor to my work. By his own accounting, Klarman tries to answer three questions: "What factors explain the dramatic changes in racial attitudes and practices that occurred between 1900 and 1950? What factors explain judicial rulings such as *Plessy* and *Brown*? How much did such Court decisions influence the larger world of race relations?"[32] While the first and third questions render Klarman's work appreciably broader than my own, the second is one that my work attempts to answer as well. Like my approach to answering the second question, Klarman's is multidisciplinary, drawing on history, law, and sociology. In short, Klarman concludes:

[31] Klarman (2004).
[32] Id., at 4.

> judicial decision making involves a combination of legal and political factors. A legal axis, which consists of sources such as text, original understanding, and precedent, exists along a continuum that ranges from determinacy to indeterminacy. In other words, some legal questions have fairly clear answers, while others do not. A political axis, which consists of factors such as the personal values of judges, the broader social and political context of the times, and external political pressure, exists along a continuum that ranges from very strong preferences to relatively weak ones. . . . When the law is clear, judges will generally follow it, unless they have very strong personal preferences to the contrary. When the law is indeterminate, judges have little choice but to make decisions based on political factors.[33]

Klarman argues that applied to the mid-twentieth century historical context of *Brown*, this framework accounts for the *Brown* justices' decision-making. The "political factors" to which he alludes manifest themselves as shifts in public opinion. Judges' receptivity to those shifts, as refracted through the "elite subculture" that judges occupy, explain judges' willingness to invalidate long-standing precedent and to reinterpret the Constitution in accordance with public opinion-mediated elite consensus. "[B]ecause constitutional law is generally quite indeterminate," Klarman claims, "constitutional interpretation almost inevitably reflects the broader social and political context of the times."[34]

What most obviously distinguishes my answer to the second question from Klarman's is that my work attempts to establish, at a deep causal level, *how* changed elite opinion migrated from the justices' private consciences to the U.S. Reports. In other words, my research takes for granted that the moral views of most non-southern American elites, including the justices of the

[33] Id., at 5.
[34] Id., at 5.

Supreme Court, had evolved on segregation and racial discrimination generally. What interests me is how the justices, especially the more formalist ones like Frankfurter and Jackson, reconciled their judicial philosophies with the demands of private conscience, and how the decision-making of the associate justices influenced the reasoning and rhetorical strategies of the final opinion for the Court. I posit that a psychological model of moral decision-making, operationalized for the study of judicial process, unifies the available primary source evidence. The model additionally explains the manner in which the justices achieved unanimity in *Brown*, and the writing-process and holding of the final *Brown* opinion.

Jack Balkin's work on *Brown*[35] is also relevant to my inquiry. Balkin views the evolution of American constitutional law in terms of models of citizenship, and contends that *Brown* is an inflection point between the end of the "tripartite theory of citizenship" and the beginning of the modern "model of scrutiny rules." The tripartite theory of citizenship, Balkin claims, began with the ratification of the Civil War Amendments, and reads the equal protection guarantee of the Fourteenth Amendment as its framers in the 39th Congress did: narrowly. The tripartite model distinguishes among civil, political, and social equality, and holds that the Equal Protection Clause of the Fourteenth Amendment assured only the first of those. The Fifteenth Amendment, of course, guaranteed political rights, but none of the Amendments secured a guarantee of social equality between blacks and whites. The model of scrutiny rules, in contrast, has its roots not in an original-ist interpretation of the Civil War Amendments but in judicial decisions that coincided with the end of the Court's surveillance of social and economic legislation. The two most important of those decisions are *United States v. Carolene Products*[36] and *Korematsu v. United States*,[37] in which,

[35] Balkin (2011).
[36] 304 U.S. 144 (1938).
[37] 323 U.S. 214 (1944).

respectively, the Court announced that it would begin (1) scrutinizing more closely laws that infringed or curtailed the rights of "discrete and insular minorities"[38] and (2) viewing legislative racial classifications as intrinsically "suspect."[39] This legal regime of scrutiny rules operates by recognizing and articulating "suspect classifications" and "fundamental rights" against which judges balance claims of legislative purpose or interest. In the decades following *Brown*, the model of scrutiny rules would supplant its predecessor's constitutional agnosticism toward social equality with the requirement that state action not subject citizens to suspect classifications. Another way of saying this is that the scrutiny rules model would recognize "protected classes" of persons——racial and religious minorities, women, etc.——and task judges with being especially vigilant of those groups' rights and interests against legislative restriction.

Balkin argues that although *Brown* announced the end of the tripartite theory of citizenship and inaugurated the modern regime of equal protection, the decision did not itself develop the model of scrutiny rules that would replace the older regime. *Brown* "presages a new way of organizing the idea of equal citizenship, one that will eventually employ concepts such as scrutiny rules, suspect classifications, and fundamental rights," Balkin states. But "*Brown* does not tell us anything about this theory, because it has not been developed yet. Instead, the very paucity of *Brown*'s arguments, and the massive resistance that followed *Brown*, spur lawyers, judges, and legal scholars to come up with novel and sophisticated theories about why *Brown* was correct."[40] Balkin acknowledges, in other words, that *Brown* was not self-justifying. It did not develop a robust and generalizable theory of equal protection that could be applied to future cases in which state action

[38] Though *Carolene Products* was a federal commerce power case, Footnote 4's internal references were all to state cases. The Court thereby signaled that it would apply its scrutiny to state legislation with special vigilance. 304 U.S. 144 (1938), at 152-153.
[39] Balkin (2011, 154-157).
[40] Id., at 159.

was claimed to discriminate against some class of citizens. Hence the need for ascertaining *Brown*'s holding——a central goal of my research. Balkin posits that there are three ways in which to interpret *Brown*.

> First, it might stand for a principle forbidding government to make classifications based on race. Second, it might stand for a principle forbidding government from subordinating one social group to another (or helping to maintain this subordination). Third, it might stand for a principle of fair distribution of the public goods and services that are necessary to equal citizenship in an increasingly complicated world. Call the first the anticlassification principle, the second the antisubordination principle, and the third the principle of fair distribution of citizenship goods.[41]

My work will show that as a partial consequence of the way in which the justices arrived at their decisions, and of the concerns and considerations they entertained in the conference discussions and expressed in their intrachamber memoranda throughout the *Brown* decision-making process, *Brown* advances the consequentialist antisubordination principle, as opposed to the deontological anticlassification one. Though anticlassification may characterize the majority of the applications of the model of scrutiny rules since the 1980s, during which time a conservative Court has been ascendant, it does not describe the decisions of the Court during which the model of scrutiny rules was being elaborated and consolidated in the 60s and 70s. In its examination of the *Brown* primary source record, my dissertation will show that the more anticlassification interpretation of *Brown* comprises conservative retrenchment from the consequentialist reasoning and purpose of the decision.

[41] Id., at 161.

My research will also refer and respond to Jeffrey Hockett's[42] recent work on *Brown*. Hockett helpfully canvasses the history of the litigation, the arguments of the litigants, the timeline of the hearing and rehearing, the justices' conferences, interactions, and interchamber memoranda, and the record of the justices' private reflections. Thus, in terms of the scope of the material surveyed, Hockett's work is the best precedent for my own. I disagree, however, with the thrust of Hockett's interpretative analysis. His primary claim is that three factors dominated the justices' decision-making process: the justices' sense of and adherence to the court's institutional mission in vindicating the rights of minorities whom the democratic process has failed; their desire to improve the international reputation of the United States in the global struggle against the Soviet Union; and their prediction that desegregation would favorably alter the domestic political calculus for liberalism, particularly in the South. In highlighting the role these factors played in the *Brown* decision-making process, Hockett downplays the influence of the justices' ideological views and political attitudes. He contends that there is little correlation between measures of the justices' political ideology and their votes in *Brown*, and claims that there are good reasons to believe that many of the justices harbored illiberal views on race even after joining the Court. In my view, Hockett's deprecation of attitudinalism and elevation of the justices' sense of the Court's ostensible institutional mission, their opinion of the importance of foreign affairs, and concerns about the domestic political calculus are highly speculative and generally belied by the plain words and actions of the justices, which suggest their moral sentiments were strongly egalitarian. Consequently, I view Hockett's work as useful more for its exposition of primary source materials than for his occasionally strained accounting of the roles played by factors that in my view, if they explain any of the justices' behaviors, do so in a secondary and undocumented manner.

[42] Hockett (2013).

Finally, I should broach the primary methodological work from which my own analysis will take its bearings, and to which it will partially respond. Segal and Spaeth's[43] pathfinding work in developing the attitudinal model of judicial behavior provides a template upon which my analysis improves. Segal and Spaeth's attitudinal model posits that measures of judges' ideological values (or attitudinal preferences) predict those judges' voting behaviors. However, their model is agnostic as to the specific causality of how judges' attitudes determine their voting behaviors. My work fills the causal gap in traditional judicial attitudinalism by positing a theory of deep causal attribution. The model of decision-making that I operationalize for this study identifies the specific psychological processes by which the justices reached their decisions, and explains how those processes are interrelated. By providing a theory of psychological decision-making, my model will explain, to an unprecedented degree in the study of judicial behavior, the causal chain in each justice's decision-making in *Brown*. Using the model's insights, I will also link and illuminate the reasoning employed in the final opinion for the Court to the character of those psychological processes. Now, a major caveat is in order. I do not claim to and will not show that the particular species of attitudinalism I advance explains all of the justices' behaviors as survive in the primary source record. I simply contend that the model accounts for most of those behaviors, and does so more plausibly than any other model or combination of models of judicial behavior. However, as the cases of Reed and Clark will show, there is considerable——and dispositive in Reed's case——evidence indicating that those justices did not have a *moral preference* for desegregation, a factor whose presence is central to my analysis of the other seven justices. The primary elements of Reed's and Clark's decision-making are nonetheless captured and explained by my model, albeit

[43] Segal and Spaeth (2002).

via different paths (linkages, the vocabulary of the model) than those by which the model illuminates the other justices' behaviors.

FINDINGS

My fresh examination of the *Brown* primary source record demonstrates that the composition of the ultimate *Brown* opinion, and in particular its lack of a robust constitutional rationale, were functions of the justices' individual decision-making. To elucidate the justices' decision-making in *Brown*, my work operationalizes and deploys for the study of judicial behavior the social intuitionist (SI) psychological model of moral decision-making, which was developed by social psychologist Jonathan Haidt in the early 2000s.[44] The core prediction of the SI model is that in response to an eliciting stimulus *S*, emotion or intuition determines judgment, and judgment then motivates reasoning. That is to say, intuition or emotion, *not reasoning*, causes judgment (e.g., *S* is bad or immoral); language or reasoning then finds reasons *R* and evidence *E* to justify the conclusion (e.g., *S* is bad or immoral because *R* and *E*). This process usually occurs automatically and is largely opaque to the person experiencing it. Thus, people tend to misunderstand the nature of their own decision-making, thinking that the reasons and evidence that they marshalled to justify a judgment *explain, preceded,* and *caused* them to reach that judgment, when it was in fact intuitions or emotions that did so.

Two methodological virtues of the SI model are that it is falsifiable (as when, for example, there exists evidence that deductive reasoning from general principles occurred prior to the determination of judgment) and countenances exceptions. For instance, the model holds that reasons

[44] Haidt (2001). Greene et al. (2001), Greene et al. (2004), and Greene (2009) provide qualified support for Haidt's model by showing that deontological moral judgments are driven by affective (emotional) responses. Those authors show that utilitarian judgments, in contrast, are driven by rational calculation. During the *Brown* decision-making process, deontological arguments predominated.

and evidence do sometimes form direct inputs to the moral decision-making process. More than being widely dispersed among the population, though, this "rationalist" mode of moral reasoning tends to be circumscribed to small classes of people, such as academic philosophers and logicians, who have received professional education and socialization that uniquely prepare and encourage them to follow a train of logic to its sometimes disturbing or morally unacceptable conclusions. The SI model holds that instead of comprising direct inputs to moral decision-making, reason and evidence more frequently form indirect inputs and affect judgment by eliciting countervailing emotions or intuitions that in turn operate upon judgment directly. Nevertheless, the model posits, all but a vanishingly small number of inputs to moral judgment are intuitions and emotions elicited in response to non-rational stimuli (i.e., to things other than reasoned arguments and evidence that contradict a person's initial views of the matter).

As I mentioned a moment ago, in the conceptual universe of public law scholarship, the SI model is a species of attitudinalism. Whereas traditional public law attitudinalism observes a correlation between judges' voting behavior and measures of judges' political ideology, most attitudinalist models do not suggest a causal framework to explain the relationship. The SI model remedies this shortcoming by positing a causal mechanism for judgments involving morally or politically salient questions. Furthermore, the SI model has telltale evidentiary "fingerprints" from which its applicability can be reliably inferred. Such fingerprints include the order in which judgment and reasoning occur, but also extend to psychological correlates of intuition-mediated judgment, such as motivated reasoning, confirmation bias, and attitude and group polarization. Lastly, the SI model, correctly understood, negates the hard attitudinalist claim that judges crassly and consciously——in a word, "unjudicially"——substitute their private, subjective moral judgments "for the law," or for voids in the law, in hard cases. Instead, the model demonstrates that judges'

moral intuitions appear to motivate, and are therefore inextricably bound up in, their views of the law, often in ways (owing to the nature of the moral decision-making process) that are hidden from judges themselves. None of this, though, impugns *Brown*'s moral and legal legitimacy, which is, in the apt words of Michael W. McConnell, "utterly secure."[45] Rather, the application of the model follows from the facts that most of the justices' behaviors closely fit it and that the model can consequently elucidate the justices' intentions and *Brown*'s legal holding.

This work will demonstrate that the *Brown* opinion lacked a robust and generalizable theory of equal protection as a direct consequence of the fact that eight of the nine justices decided to invalidate segregation by means of intuition-driven or -mediated moral decision-making, as opposed to strictly a priori reasoning or logical deduction. The legalist model of judicial behavior is therefore inapposite to *Brown*. Moreover, no justice succeeded in developing a defensible originalist basis for invalidating segregation, though Justices Felix Frankfurter and Robert Jackson felt compelled to do so and failed in their attempts. Finally, during the *Brown* decision-making process, some of the justices contemplated and endorsed race-conscious integration as a remedy and treated segregation as a problem of national, not regional (i.e., exclusively Southern) scope. My research accordingly reaches two conclusions.

(1) The SI model explains the primary elements of the decision-making of every justice on the Court, albeit by different linkages. Nonetheless, other models, such as the legalist and strategic ones, explain subordinate aspects of the justices' decision-making. Therefore, while the SI model does not exhaustively describe the justices' decision-making, it succeeds in accounting for the major part of the *Brown* decision-making process. Not every justice demonstrated unequivocal evidence of having reached a judgment that was motivated by moral intuitions prior to contriving

[45] McConnell (1995, 955).

a judicial rationale for his outcome, but every justice exhibited evidence of either confirmation bias or motivated reasoning, both of which are SI model correlates. Reed, Frankfurter, Jackson, and Clark additionally exhibited evidence of attitude polarization and/or group polarization.

(2) *Brown* has an unequivocally consequentialist, not a deontological or colorblind, provenance and purpose. In Balkin's terms, the case enshrines the antisubordination principle. The decision's consequentialist character is rooted in the justices' intentions, concealed in both the *Brown* merits decision and putatively colorblind *Brown II* remedy order, but revealed in the primary source record, not to outlaw racial classifications per se, but to dismantle the institution of segregation——to strike at and precipitate the abolition of an entire way of life, not merely enjoin its legal apparatus.

However, my research is *not* intended to demonstrate anything about judicial behavior generally. To otherwise would require the study of more cases than only *Brown*. Neither does my inquiry purport to show that the judicial decision-making that took place in *Brown* is *not* representative of judicial behavior generally. This work confines itself to the narrow claim that a psychological model of moral decision-making can elucidate the causes of judicial decision-making in *Brown*, the most important Supreme Court decision of the twentieth century, and the decision's holding as a matter of constitutional law.

ORGANIZATION AND PRIMARY SOURCES

Chapter 2, an analysis of the final *Brown* opinion, elucidates the deficiencies of the decision, foreshadows relevant elements of the primary source record that connect to them, and problematizes the narrative Warren develops in the opinion, "short, readable by the lay public, non-

rhetorical, unemotional and, above all, non-accusatory"[46] though he intended it to be. Chapter 3 provides a full account of the social intuitionist model and its operationalization for qualitative analysis. Chapters 4, 6, and 7 comprise the bulk of the analysis of the justices' decision-making. Chapter 4 examines the decision-making processes of seven of the nine justices, both because the seven struggled far less with their decision-making than the two, and (as a partial consequence) because available materials on the seven can be comprehensively analyzed in far less space. Felix Frankfurter and Robert Jackson, whose decision-making comprises the subject matter, respectively, of Chapters 6 and 7, struggled laboriously to reconcile their judicial philosophies to the outcome they would eventually join. Of the seven justices who unequivocally harbored private moral preferences for desegregation, Frankfurter and Jackson have the longest paper trails and took the judicial case for segregation the most seriously. They therefore exhibit behaviors that are, of all the justices', the most interesting and illuminating for understanding and fully appreciating the political, moral, and judicial stakes present in *Brown*.

Chapter 5 is a re-analysis of the historical materials examined in Alexander Bickel's "Legislative History of the Fourteenth Amendment." The chapter comes when it does——after the examination of most of the justices but before the studies of Frankfurter and Jackson——to afford the reader a sense of the historical evidence that the justices confronted in the form of Bickel's memo, which Justice Frankfurter circulated among the Brethren in the fall of 1953. The objective of the chapter is to demonstrate that the Fourteenth Amendment's history was not, as both Frankfurter and Bickel would have it, "inconclusive" as to whether the Amendment targeted segregation, either

[46] May 7, 1954 cover memo to *Brown* and *Bolling* draft memoranda. Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, The University of Texas at Austin.

at the time of adoption or in the future. The chapter will argue that the Amendment was not intended by its framers——as Chief Justice Warren and Justices Hugo Black, Sherman Minton, and Harold Burton seemed to opine at the *Brown* conferences——to put blacks on an equal footing with whites in every respect. The chapter shows in fact that the framers of the Fourteenth Amendment, including the members of the Joint Committee on Reconstruction who drafted it, were on guard against possible future "latitudinarian" abuses of overly vague language, and on several occasions replaced wording that they feared too susceptible of overly expansive interpretation with language of more "determinate" reach. The chapter is necessary to establish the extent to which the justices engaged in motivated reasoning and confirmation bias when considering the history of the Amendment and its possible constitutional significance for segregation. The chapter is not, however, intended to impugn the Court's conclusion that racial segregation in 1954 was unequal or a violation of equal protection. I only claim to show that none of the justices could (and only Justices Felix Frankfurter and Robert Jackson made efforts to) reconcile that determination with the clear historical fact that "the equal protection of the laws" was not intended or understood by the 39th Congress to command social equality. Many of the justices appeared not to look too closely at the history and seemed simply to rest satisfied with the conclusion that Bickel's recounting of the history proved something (the history's "indeterminacy" with respect to segregation) that the study in fact did not.

Chapter 8 is the work's conclusion. It examines the factors that compelled Justice Reed to join his Brethren in voting to invalidate segregation, elucidates Warren's opinion-writing process, articulates the significance of the change in the forms of reasoning employed by the justices over the course of the *Brown* decision-making process, and suggests that the justices in *Brown* employed a meta-consequentialist judicial approach whose outcome in the final *Brown* decision was

the employment of a primarily consequentialist rationale. The chapter concludes by showing that *Brown* embodies the antisubordination principle.

The primary source materials upon which this work bases its analysis are the justices' conference notes, their private memoranda, their letters to private citizens, and interviews with the justices and their law clerks by biographers and journalists. Of these, the materials that figure most prominently in this work are the justices' conference notes. Four sets of notes on the *Brown* December merits conferences survive. They are Douglas', Jackson's ('52 only), Burton's, and Clark's ('52 only). I acquired Douglas' and Jackson's from the Library of Congress and Clark's from the Tarlton Law Library at the University of Texas at Austin; I did not acquire a copy of Burton's, but rely instead upon the extensive reporting of his observations in the research of Kluger, Schwartz, and Hockett. All of the works that have contributed to the scholarly literature on *Brown*——including those of Kluger, Hutchinson, Schwartz, Tushnet and Lezin, and Hockett——have availed themselves of one or more sets of these notes.

The conference notes form the basis for most of the analysis of Chapter 4. While Chapters 6 and 7, which examine the decision-making of Frankfurter and Jackson, analyze the notes to reconstruct those justices' conference comments, the bulk of those chapters derives from memoranda documents located in the Felix Frankfurter Harvard Law School Papers and the Robert H. Jackson Papers at the Library of Congress. The Frankfurter memo on the *Brown* merits that comprises one of focal points of Chapter 6 is available in the Felix Frankfurter Harvard Law Papers, but was also quoted in its entirety by Kluger. The three drafts of Jackson's *Brown* concurrence memorandum come from the Robert H. Jackson Papers. The fourth draft, which is not examined

in Chapter 6, is available in an abridged published form, in Whitman, *Removing a Badge of Slavery: The Record of* Brown v. Board of Education.[47] To improve the availability of the first three drafts of Jackson's *Brown* memos for future research, they have been transcribed and reproduced in the appendix to this work.

Chapter 4 additionally references materials from the Felix Frankfurter Harvard Papers, including a letter from Bickel to Frankfurter, as well as materials located in the Tom C. Clark papers, in particular Clark's memo on *Sweatt* and *McLaurin*, Earl Warren's May 7 cover memo to the *Brown* and *Bolling* opinions, Frankfurter's cover letters to Bickel's memo, and Bickel's Prefatory Note to his research on the legislative history of the Fourteenth Amendment. Chapter 5, on Alexander Bickel's treatment of legislative history of the Fourteenth Amendment, relies upon materials located in the Felix Frankfurter Harvard papers. Finally, Chapter 7 quotes at length from letters between Robert Jackson and Charles Fairman in the Charles Fairman Papers at the South Texas College of Law.

[47] Whitman (1993, 292-299).

Chapter 2. The *Brown* Opinion

> No person shall […] be deprived of life, liberty, or property, without due process of law[.]
>
> ——U.S. Constitution, Fifth Amendment

> §1. […] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. […]
>
> §5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
>
> ——U.S. Constitution, Fourteenth Amendment

Chief Justice Earl Warren's succinct, eleven-page opinion for a unanimous Court in *Brown* is probably the most famous of the 20th Century. It begins with a statement of the facts common to the five consolidated cases, and acknowledges that all of the federal district courts found for the respondents on the basis of the "separate but equal doctrine" of *Plessy v. Ferguson*. "Under that doctrine," Warren declares, "equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate." Warren then states the petitioners' claims: "The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws." The decision next canvasses the history of the litigation before the Court, and remarks that the most recent hearings (in 1953) had been held on reargument of questions about the history of the adoption and intended effect of the Fourteenth Amendment in 1868. The results of this historical inquiry, Warren declares, "convince us that, although these sources cast some light, it is not enough to resolve

the problem with which we are faced." Maintaining that the historical resources examined by the Court are "inconclusive," Warren prosaically observes that the proponents of the Civil War Amendments "intended them to remove all legal distinctions among 'all persons born or naturalized in the United States,'" while their opponents "were antagonistic to both the letter and the spirit of the Amendments" and wished to circumscribe the Amendments' effect. Warren concludes by stating, "[w]hat others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."[48]

The apparent thrust of these opening paragraphs is that the historical record casts little light on the specific question before the Court in 1954: whether state laws requiring racial segregation in public education were intended to be targeted by or exempt from the Fourteenth Amendment's Equal Protection Clause. However, this claim is belied by the documentary record of the reactions of some of the justices to reargument on the Fourteenth Amendment and the justices' experiences with the then-recent cases concerning segregation in graduate and professional school. As an illustration of this point, Justice Tom Clark is recorded as remarking at the second *Brown* conference that he had always thought the purpose of the Civil War (Thirteenth, Fourteenth, and Fifteenth) Amendments was to make blacks and whites entirely equal before the law, implying that the arguments and briefs presented throughout the latest hearings on *Brown* had convinced him otherwise.[49] Furthermore, at both *Brown* conferences, Reed[50] and Jackson[51] spoke in opposition to the assertion that the history of the Fourteenth Amendment was "inconclusive" with respect to segregation.

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[48] 347 U.S. 483, at 487-489.
[49] See discussion at fn 221, *infra*.
[50] See discussion at fn 197, *infra*.
[51] See discussion at fn 341, *infra*.

As if hedging his bet on the persuasiveness of this line of historical argumentation, in the subsequent paragraph Warren contends that public schools in 1868 lacked the compulsory character and the binding social function of American public education of almost a century later. He observes that the South did not have "free common schools, supported by general taxation"; that "education of Negroes was almost nonexistent"; that "[e]ven in the North, the conditions of public education did not approximate those existing today" and "compulsory attendance [there] was virtually unknown." Accordingly, Warren surmises, "it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education." The implication, though, is not to be the one Warren evidently intends. Rather, the lesson seems to be that *even if* a contrary case to the one Warren presented in the preceding paragraph could be proved, one need not accept the argument as dispositive. If the adoption of the Fourteenth Amendment can be dated to prior to the advent of modern, compulsory education, then the defensibility of an interpretive approach to that Amendment that takes its bearings from history is undermined, and the pregnant possibilities of the abstract language of the Amendment can supersede the narrow historical intentions of its framers. Without making explicit its implication, Warren cements this point in footnote four, appended to the opening sentence of the paragraph: "Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states."[52]

Warren next proceeds into a discussion of the first major Equal Protection Clause controversies before the Court, the *Slaughterhouse Cases*[53] and *Strauder v. West Virginia*.[54] These cases, he explains, were the first in which "this Court construed the Fourteenth Amendment," and the

[52] 347 U.S. 483, at 489-490.
[53] 83 U.S. 36 (1873).
[54] 100 U.S. 303 (1880).

Court did so "as proscribing all state-imposed discriminations against the Negro race." Warren immediately contrasts these decisions' unequivocal holdings to the later one of *Plessy v. Ferguson*: "[t]he doctrine of 'separate but equal' did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, involving not education but transportation." Footnote 5, which, like footnote 4, accompanies the opening sentence of its paragraph, quotes *Strauder* at length. What is the meaning of the Equal Protection Clause, the *Strauder* excerpt asks, "if not [] that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" Warren's purpose in comparing the elegant, perspicacious reasoning of *Strauder* with *Plessy*'s paradoxical catchphrase is clear: the contrast has the effect of suggesting that *Plessy* is not the true constitutional authority for understanding the Equal Protection Clause, but a doctrinal aberration that improvidently revised earlier, truer constructions of the clause, and unfortunately forced the Court into a path-dependent interpretative approach that had, as of the mid-1950s, only recently begun to be corrected. Warren's language following the first mention of *Plessy* in the main body of the decision buttresses this impression: "American Courts have since labored with the *Plessy* doctrine for over half a century."[55]

The Chief Justice's next move is to survey the cases in which the Court took *Plessy* as a compass for navigating the terrain of public education. The findings are not reassuring of *Plessy*'s authority or applicability. *Cumming v. County Board of Education*[56] and *Gong Lum v. Rice*[57] are quickly and succinctly distinguished from the segregation cases at bar because they did not directly

[55] 347 U.S. 483 at 490-491.
[56] 175 U.S. 528 (1899).
[57] 275 U.S. 78 (1927).

challenge *Plessy*'s authority as a constitutional precedent. Warren then closes in on the real prize in the trilogy of recent Court decisions that went against *Plessy*'s grain if not its letter: *Sipuel v. Oklahoma*,[58] *Sweatt v. Painter*, and *McLaurin v. Oklahoma State Regents*. These decisions interpreted the Equal Protection Clause to require states to provide graduate education to blacks substantively equal to that afforded whites in state universities. Warren observes that the Court did not explicitly impugn *Plessy*'s authority in those cases, and that in *Sweatt* the Court even "reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education." He then notes that "in the instant cases," the question the Court nimbly elided publicly (although discussed at length privately) in *Sweatt* and *McLaurin* "is directly presented." Warren stresses the findings of the lower federal trial and state courts out of which the *Brown* cases originated "that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors," thereby highlighting the contrast between the graduate education cases and the cases at bar. Warren then deploys a pivotal rhetorical legerdemain: "Our decision, therefore, cannot turn on merely a comparison of these tangible factors" in black and white schools; "[w]e must look instead to the effect of segregation *itself* on public education."[59]

Warren's seamless transition from acknowledging the equalization of tangible factors in segregated school environments to announcing the imperative of examining the "effect of segregation *itself* on education" reveals that the question whether *Plessy* is applicable to public education has already been answered in the negative. Were the question still an open one, the inquiry would presumably shift from taking judicial notice of a *prima facie* trend of equalization to closer

[58] 332 U.S. 631 (1948).
[59] 347 U.S. 483, at 491-492 (emphasis added to the immediately preceding quote).

scrutiny of the degree of that equalization in order to determine whether either the attained degree or the rate of change has defensibly approximated, or is in the process of approaching, the level of equality *Plessy* commands. The advantage of concealing the fact that the question has already been answered is that the basis on which it is resolved need not be candidly explained. To put the matter more plainly, the effect of this rhetorical move is to enable Warren to avoid explicitly acknowledging that the Court has effectively already overruled *Plessy*.

Reading *Brown* from the point at which it mentions *Plessy* to the point at which Warren acknowledges the equalization of "'tangible' factors," one comes away with the impression that the Court was moved by a hidden, inexorable force independent of and contrary to *Plessy*. That force, it turns out, was the aforementioned trilogy of graduate and professional education cases. The NAACP brief filed in the original *Brown* hearings under Chief Justice Vinson in 1952 proclaimed: "*Plessy v. Ferguson* is not applicable" to public education. "Whatever doubts may once have existed in this respect were removed by this Court in *Sweatt v. Painter*, *supra*, at 635, 636."[60] *Sweatt* held that the creation of a separate law school for blacks in order to ensure education for whites only in the state's flagship law school at the University of Texas at Austin denied blacks equal protection of the law. The portion of *Sweatt* cited ("at 635, 636") in the NAACP's 1952 *Brown* brief commences with a dismissal by then-Chief Justice Vinson of Texas' assertion that "excluding petitioner from that school is no different from excluding white students from the new law school." This argument, Vinson contends, "overlooks realities." Vinson states that no member of the white majority would judge "a [law] school with rich traditions and prestige which only a

[60] 1952 Brief for Appellants in *Brown v. Board of Education*, at 11. File Date: 9/23/1952. U.S. Supreme Court Records and Briefs, 1832-1978. Gale, Cengage Learning. University of Texas at Austin - Law. Accessed November 14, 2017. Available at http://galenet.galegroup.com.ezproxy.lib.utexas.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW109828476.

history of consistently maintained excellence could command" equal to what Texas proposed for segregated education for blacks: a law school with substantially less. Then, quoting *Shelley v. Kraemer*,[61] Vinson summarizes his train of thought in a statement whose logic would impel *Plessy*'s death knell in *Brown*: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."[62] Two paragraphs hence, Vinson concludes that "petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such evidence is not available to him in a separate law school as offered by the State." It is on this basis, finally, that the Court "hold[s] that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School."[63] Pointing to this line of reasoning, the 1952 NAACP *Brown* brief declares:

> In the *McLaurin* and *Sweatt* cases, this Court measured the effect of racial restrictions upon the educational development of the individual affected, and took into account the community's actual evaluation of the schools involved. In the instant case [of *Brown*], the [federal district court] found as a fact that racial segregation in elementary education denoted the inferiority of Negro children and retarded their educational and mental development. Thus the same factors which led to the result reached in the *McLaurin* and *Sweatt* cases are present. Their underlying principles, based upon sound analyses, control the instant case.[64]

This is the position that Chief Justice Warren appears to have adopted by the point in the *Brown* decision at which he proclaims the need to examine "the effect of segregation itself on public

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[61] 334 U.S. 1, at 22.
[62] 339 U.S. 629, at 634-635.
[63] Id., at 635-636.
[64] 1952 Brief for Appellants in *Brown v. Board of Education*, at 12-13. File Date: 9/23/1952. U.S. Supreme Court Records and Briefs, 1832-1978. Gale, Cengage Learning. University of Texas at Austin - Law. Accessed July 5, 2017. Available at http://galenet.galegroup.com.ezproxy.lib.utexas.edu/servlet/SCRB ?uid=0&srchtp=a&ste=14&rcn=DW109828476.

education." To eschew an analysis of the facts of *Brown* under *Plessy* is not merely to reject *Plessy*'s applicability to the arena of public education, but silently to assert its incompatibility with the Equal Protection Clause. At this stage of the decision, Warren has, to the careful reader, announced that *Plessy* is not merely inapplicable to public education, but is essentially at odds with the Fourteenth Amendment.

The ensuing paragraphs of the *Brown* decision emphasize the altered status of public education in the United States since the adoption and ratification of the Fourteenth Amendment. Having hinted at this point earlier, Warren now means to cement it: "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and *present place* in American life throughout the Nation."[65] In other words, though, for the sake of argument, *Plessy* might have been a defensible interpretation of the Equal Protection Clause in 1896, that defensibility does not incontrovertibly imply authoritativeness at a later time, when the status and import of the arena of public life that the courts scrutinize for consistency with constitutional commands has changed substantially. This observation reinforces and extends the decision's earlier implication, discussed above, that the rudimentary character of American public education in the mid- to late 19th century, and the fact it was not universal or compulsory, postdates *modern* public education with respect to the adoption of the Fourteenth Amendment. The import of these facts is that the historical record of the Amendment's adoption by Congress and ratification by the states need not be consulted with a specific view to the compatibility of state-mandated racial segregation in public education, since public education as understood in mid-20th century America did not exist at the time. "Today," Warren observes by contrast,

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[65] 347 U.S. 483, at 492-493.

> education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[66]

While the Chief Justice's words are eloquent, the connection between his articulation of the purposes of public education and the imperative to provide it "to all on equal terms" is not self-evident. The intended upshot of these lines, however, is less ambiguous: American public education in 1954 is different in kind, not degree, from that of 1868 or even 1896. It is by priming the reader with the salience of this distinction that Warren prepares him for the question to follow, and to hear its answer in the Court's new-and-improved take on the Fourteenth Amendment, rather than the particular intentions of the Amendment's framers.

"We come then to the question presented," Warren declares. "Does segregation of children in public schools solely on the basis of race, even though the physical faculties and other 'tangible' factors [] be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." This is the one instance in the decision in which the Court squarely states

[66] Id., at 493.

the question it intends *Brown* to answer; the diction is accordingly of crucial importance. Four observations are in order.

First, though Warren uses the term "segregation"——noun, not verb——the attendant chain of prepositional phrases clarifies that this peculiar species of segregation must be by state action. "Segregation . . . solely on the basis" of some criterion necessarily implies a willful decision by a human agent to delineate conceptually according to the criterion and segregate practically along the line the criterion specifies. If there is any doubt as to this point, a literal explication of the terms "solely on the basis of race" removes it. In what sense could segregation could be described as both "solely" on some "basis" and *no*t the product of a deliberate action by a human agent? For instance, would it make sense to use any of the phrases "solely on the basis of birth," "solely on the basis of height," "solely on the basis of blood type," or "solely on the basis of test scores" outside of the context of deliberate action by a human agent? Whatever the criterion, its use in the formulation beginning "solely on the basis of" can only be understood to signify purposeful human action with a view to the criterion. Read in this light, Warren's expression "[s]egregation . . . solely on the basis" can have no other plausible construction than state action to separate students of different races. This interpretation is confirmed by the NAACP's social science brief, which in its second paragraph clarifies that the brief's use of the term "segregation" signifies state action with the purpose to segregate school population according to one or more criteria. "For purposes of the present statement," the brief reads, "*segregation* refers to that restriction of opportunities for different types of associations between the members of one racial, religious, national or geographic

origin, or linguistic group and those of other groups, *which results from or is supported by the action of any official body or agency representing some branch of government*."[67]

Second, in the formulation of the dependent clause of the interrogatory, Warren describes educational conditions that meet *Plessy*'s command——substantive equality, or equality of "tangibles," under conditions of separation. Though apparently taking care not to broach *Plessy* by name, Warren obviously has the offending precedent in his sights. The very formulation of the decision's central question, whose answer will circumnavigate and supplant *Plessy* while not overruling it explicitly, suggests as much. Corroborating evidence of Warren's wish to conceal the true extent of the *Brown* generally and the overruling of *Plessy* specifically comes from a memorandum written to Justice Frankfurter by E. Barrett Prettyman, who had been Justice Jackson's October 1953 term clerk and had stayed on for the 1954 term until Jackson died of a second heart attack on October 9, 1954. Dated December 15, 1954, the memo recounts Warren's May 10, 1954 visit, as the final *Brown* draft was taking shape, to a convalescing Jackson in Walter Reed Hospital after Jackson's first heart attack in late March of 1954.

> While [Jackson] was still in the hospital, The Chief Justice personally delivered [the *Brown* draft majority opinion] to him. Justice Jackson and I talked about the opinion and agreed that it could use a little more law. The Justice asked me to type up a short paragraph, taken substantially from the memorandum I had already written him on his own opinion. He was going to suggest to the Chief (who was due to come back that afternoon) that the paragraph

[67] NAACP Social Science Brief (1952). "Appendix to Appellants' Briefs: The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," at 2 [emphasis added to relative clause]. File Date: 9/23/1952. U.S. Supreme Court Records and Briefs, 1832-1978. Gale, Cengage Learning. University of Texas at Austin - Law. Accessed November 14, 2017. Available at http://galenet.gale-group.com.ezproxy.lib.utexas.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW109828476.

> be added to the Chief's opinion. I typed up the attached paragraph and took it to the Justice. He deleted the clause following the Plessy citation because he did not want to pass judgment in any way upon the wisdom or justification of the Plessy decision. He told me later that he did not show the attached sheet to the Chief but instead orally suggested its contents to him. The Chief, however, had a very good reason for not wanting this statement in the opinion as a legal justification: Everything in the Chief's opinion was directed at segregation in public education; the Justice's paragraph, on the other hand, could be applied to segregation in general. The Chief felt, and the Justice agreed, that the Court should not even intimate that segregation would fall in other fields.[68]

While the precise contents of the paragraph Prettyman prepared for Justice Jackson are unknown, the wording of the last sentence in the above excerpt strongly indicates that both Warren and Jackson intended *Brown* to comprise the first blow in dismantling all forms of state-sponsored segregation. The use of "would" in lieu of "could," if chosen deliberately by Prettyman, points to this conclusion. The final sentence also suggests, but does not prove, that the two justices believed the *Brown* opinion should begin a line of constitutional reasoning that could be extended from public education to other spheres of state action, though (if Prettyman's observation is accurate) both justices agreed that the implications of that line of reasoning should be left fastidiously unstated in *Brown*. The upshot is that both justices appeared to be extraordinarily circumspect about the decision's treatment of *Plessy*. Warren apparently intended to overrule it in spirit and letter, but not in name.

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[68] E. Barrett Prettyman, *The Papers of E. Barrett Prettyman, Jr., 1944-1982*. Special Collections of the Arthur J. Morris Law Library, University of Virginia School of Law [emphasis in the original].

Third, Warren confines the inquiry to "children of the minority group." This expression evinces the strongest indication yet that the focus of Warren's subsequent analysis will be not deontological, but consequentialist. Confining the focus of the Court's analysis to harm historically imputed to a specific class of persons without simultaneously accounting for the rights of persons outside of that class risks the danger of circumscribing any subsequent rule of action to the realm of consequentialism.[69] That is to say, Warren is gearing up not to announce a robust and generalizable theory of equal protection, but to address the application of the Equal Protection Clause of the Fourteenth Amendment to a particular class of individuals who have experienced a peculiar historical deprivation, the character of which has yet to be precisely ascertained.

Fourth and finally, Warren identifies the right to which the plaintiffs are entitled, but deprived, as "equal educational opportunities." To do so is to decide, effectively, that the equal protection of the laws requires that every class of individuals have access to educational opportunities commensurate with those available to other classes in state-supported schools——a subtle though crucial equivalence upon which Warren elaborates in the following paragraph. Additionally, Warren's use of the word "opportunities" focuses *Brown*'s inquiry on the inputs of the state-sponsored educational process. Finally, Warren does not define his choice of words. No standard is adduced

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[69] Cf. the formulation of a rule of action that is universal and transcends the contingent particulars of historical circumstance, e.g., Immanuel Kant's formulation:

> But what kind of law can this be the thought of which, even without regard to the results expected from it, has to determine the will if this is to be called good absolutely and without qualification? Since I have robbed the will of every inducement that might arise for it as a consequence of obeying any particular law, nothing is left but the conformity of actions to universal law as such, and this alone must serve the will as its principle. That is to say, I ought never to act except in such a way *that I can also will that my maxim should become a universal law* [emphasis in the original] (Kant [1785] 1964, 69-70).

One can will, as a universal law, that a historically victimized class of persons should be treated equally with those classes not so victimized, but not that the latter lose their claim to equality with the former.

or referenced for gauging the *degree* or determining the *kinds* of equality of educational opportunities. Whether or not this ambiguity is intentional, it has two effects: it affords the Court a plenary future discretion over the meaning of (and hence standards for effecting) "equal educational opportunities," while being so vague as to deflect criticism from interests or individuals unsympathetic to the Court's holding who might more easily attack a more clearly articulated standard.

In the subsequent paragraph of the *Brown* opinion, Warren highlights the Court's emphasis in the graduate and professional school education cases that separation in those contexts tends to undermine equality. First quoting *Sweatt*, Warren remarks that in that case "this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school." In its ruling in *McLaurin*, the Court similarly stressed "intangible considerations: ' . . . [the student's] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.'" So far, Warren is on strong footing. However, in proceeding to extend the *Sweatt* and *McLaurin* equal protection lines of reasoning to primary and secondary public school education, his next move is not so unassailable. "Such [intangible] considerations apply with added force to children in grade and high schools," Warren states. "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[70] In order to determine the significance and defensibility of Warren's reliance on the Court's graduate school cases as precedents for *Brown*, it is necessary to examine those cases at greater length.

In *Sweatt v. Painter* an African American prospective law student, Herman Marion Sweatt, contended that the law school that the state of Texas had established for black students in order to

[70] Id., at 494.

satisfy the first part of *Plessy*'s "separate but equal" command nonetheless ran afoul of the second. The Court agreed. But the Court's own analysis in *Sweatt* clarifies that the denial of equal protection of the laws inhered in the denial to blacks of the opportunity to receive a professional education substantially similar to the one made available by the state to whites. That denial of equal educational opportunity originated in the nature of law school education, wherein the perceived quality of the education (which is to say, the magnitude of its desirability to prospective students) is a function of institutional reputation-affecting "intangibles" such as the achievements of past graduates, the prestige of present faculty, the distribution of human capital in the student body, and networking opportunities, to name a few. The Court correctly observed that these characteristics, like all the distinctive features of elite graduate and professional education, could not be replicated or approximated with the founding of new schools, *whether segregated or integrated*, because such features take decades to develop under even the most serendipitous conditions. As the Court declared:

> Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni,

> standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.[71]

In other words, the analysis of the *Sweatt* Court located the inequality of education in graduate and professional schools created for the express purpose of segregating blacks not in the institutions' *segregation per se*, but in their *younger provenance*: generally speaking, recently founded educational institutions simply lack the prestige, traditions, professoriate, financial and physical resources, and established alumni network of older schools. The inequality of "intangibles" to which the Court referred in *Sweatt*, therefore, is rooted in the status- and prestige-related characteristics predominately peculiar to *tertiary public* and *primary and secondary private education* that can develop only in the long term. Accordingly, the denial of educational equality originates in the non-fungibility of the underlying educational resource, which renders equal education under conditions of separation impossible, because that separation depends on the creation of new schools that cannot, in any short period of time, measure up to the reputations of older ones. The significance of the foregoing for Warren's opinion in *Brown* is that the purported constitutional harms deriving from the two forms of compulsory separation are not the same harms, and do not derive from the same causes. In *Brown*, as we will see, the evident harm is the psychological burdening or stigmatizing of black students by the state's message, conveyed symbolically in the act of separation, that blacks are unfit schoolmates for whites; in *McLaurin*, the harm is the refusal to afford a black plaintiff access to a higher quality legal education. The *Brown* harm is produced by the symbolism of state policy; the *Sweatt* harm by a denial of admission. Let us assume, for a moment, that the *Brown* harm is not caused by legal symbolism, as the *Brown* opinion seems to suggest, but by the state (not act) of separation, as the *Brown* opinion has been interpreted by some

[71] 339 U.S. 629, at 633-634.

to mean. In that case, the provenance of the stigma imputed to segregation is still the *symbolism* and significance of the separation, according to *Brown*'s own analysis: nowhere does *Brown* claim that the education available to blacks segregated into blacks-only schools is inferior in any esteem-independent context to white-only schools. *Brown*'s harm is that to esteem and status; *Sweatt*'s, that of an undeniably inferior educational opportunity.

The logic of the constitutional analysis deployed in *McLaurin*, on the other hand, is arguably more parallel to that in *Brown*. But the facts are somewhat more complex than those of *Sweatt*, so I will summarize them before addressing the Court's analysis. The *McLaurin* litigation commenced with a challenge to the laws of the state of Oklahoma requiring segregation in higher education. After a trial, a statutory three-judge federal District Court found that the University of Oklahoma's refusal to admit to its graduate school George McLaurin, a black prospective doctoral candidate in education, denied McLaurin the equal protection of the laws, and ordered him admitted. In response, the Oklahoma legislature amended the relevant state laws to permit the admission of blacks to erstwhile "white" state universities. However, the legislature at the same time imposed a new requirement that where black students were admitted to formerly whites-only state colleges, instruction take place "upon a segregated basis." To comply with this legislative command, the University of Oklahoma permitted McLaurin to matriculate but required him "to sit apart at a designated desk in an anteroom adjoining the classroom; to sit, at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria."[72] The statutory district court sustained these restrictions under *Plessy*, and the NAACP appealed directly to the Supreme Court.

[72] Id., at 640.

The Court held for McLaurin. In the dispositive passage of his unanimous opinion for the Court, Chief Justice Vinson concluded that for the State of Oklahoma to "set[] McLaurin apart from the other students" is to "handicap[]" McLaurin "in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. . . . Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races."[73] However, this logic is necessarily confined to a single educational institution. It is not clear how a constitutional violation would arise under this reasoning applied to separate educational institutions until Vinson elevates it to a higher level of abstraction.

> There is a vast difference——a Constitutional difference——between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.[74]

The last sentence evinces the Court's apparent motive for finding unconstitutional Oklahoma's command that education for blacks among whites take place "on a segregated basis." Segregation is unconstitutional because it is state action that has both the intent and effect of precluding the possibility of social acceptance and of forestalling any organic movement toward social equality in the private sphere. Jack Balkin observes that the belief that the state had a duty to regulate the private sphere in order to "prevent the mixing of the races" was a central tenet of the Court's

[73] Id., at 641.
[74] Ibid.

tripartite theory of equal protection, which originated after the Civil War and was eventually dismantled by *Brown* and its progeny.[75] As early as 1950, however, the Court was prepared to hold that state action that perpetuated——without necessarily causing——the social inequality of the races was unconstitutional.

There therefore appear to be two ways to read *McLaurin*. The first is that the state cannot deny equal educational opportunities on the basis of race. It is clear that separating students from their peers within the context of a single educational institution does precisely that for the reasons the Court articulated: at least some of the educational opportunities of a particular institution inhere in socialization with one's fellow students. The second is that the state cannot perpetuate the social inequality of the races, removing a crucial component of the Balkinian tripartite model of equal protection. Certainly, to separate students by race within a given educational institution is to forestall movement toward equality where social inequality of the races already exists. However, to presage later research on the effects of desegregation on academic performance and race relations in the 1970s, to integrate such students does not guarantee mutual understanding and respect, though it might offer a higher probability of such. In any case, from these considerations emerges the unstated assumption of the second *McLaurin* interpretation: state action to preserve——without necessarily increasing——the social inequality of the races is inconsistent with "the equal protection of the laws." On this view, in other words, the Fourteenth Amendment proscribes state action that attempts to thwart the "providential fact"[76] and seemingly inexorable march of equality.

But to serve as precedent for future controversies with very different trial records involving not simply differential treatment within one school, but differential treatment across multiple

[75] Balkin (2011, 145-146).
[76] Tocqueville ([1835] 2000, 6).

schools, one (or both) of the interpretations of *McLaurin* must be concretely connected to the facts of the case at bar. Accordingly——to frame the facts of the *Brown* cases in *McLaurin*'s terms——does the state's command that black students and white students attend separate educational facilities deny the former "equal educational opportunities"? Does it deny black students social equality? The answers to both questions would seem to turn on empirical facts, rather than on *a priori* or self-evident principles.

Both questions are at bottom inquiries into causality, and to answer them is to make causal assertions. To contend that the compulsory segregation of the races denies blacks equal educational opportunities is to claim that *but for* such state action, blacks would have educational opportunities on par with, or less unequal to, those available to whites. To assert that compulsory segregation of the races denies blacks social equality with whites is to claim that *but for* such state action, blacks would have social equality with whites, or suffer from less social inequality. In fine, deploying either or both of *McLaurin*'s readings to decide future cases presupposes knowledge of, or assumptions about, the underlying causal mechanisms that deny equal educational opportunity or prevent social equality. Of course, it is possible as an empirical matter that state action is merely one of a number of causes denying blacks equal educational opportunities and social equality with whites. But the framing of *McLaurin* does not countenance the judicial incorporation, consideration, or weighing of other factors in the equal protection analysis. It instead focuses——perhaps unwittingly——that analysis entirely on the causal role of state action, while obfuscating the reality that knowledge of causality is central to the validity of its analysis and claims.

It is worth pausing to emphasize this point, as virtually all of the Court's major desegregation decisions from *McLaurin* to *Keyes v. Denver School District No. 1*[77] exhibit this paradox. That

[77] 413 U.S. 189 (1973).

puzzle is that the Court's analysis of race-related equal protection violation (1) presupposes causal relations between the identified harms and state action, while simultaneously tending (2) to conceal that the Court is making empirical causal claims, and (3) declining to adduce persuasive empirical evidence in support of those claims. The obvious exception to the third prong, footnote 11 of *Brown*, was widely derided by contemporary observers,[78] and the Court, stung by criticisms of the authoritativeness with which it adduced such social science support, was thereafter reluctant to re-enter that realm.[79] Nonetheless, the Court's pronouncements on segregation and constitutional harm are necessarily casual and empirical.

Now, in purporting to extend the *Sweatt* and *McLaurin* lines of reasoning to primary and secondary public school education, Warren fails to connect his discussion perspicaciously and concretely to *Sweatt* or *McLaurin.* Warren instead approvingly excerpts Finding of Fact No. 8 of the Kansas federal district court that tried the titular *Brown* case that segregation by law "denot[es] the inferiority of the negro group," which in turn "affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[80] This finding is irrelevant to the non-fungibility issue that served as the basis for *Sweatt*. So too is it devoid of allusion to a defensible interpretation of *McLaurin*, although it might at first appear otherwise. While it is true that Warren frames *Brown*'s central question (discussed above) as, "Does segregation of children in public schools solely on the basis of race, even though the physical faculties and other 'tangible' factors [] be equal, deprive

[78] See, e.g., Cahn (1955), and generally Jackson (2004).
[79] Although it should be noted that in future landmark desegregation cases (e.g. *Keyes v. School District No. 1, Denver*), the Court would, in putative support of its causal claims about segregation and educational opportunity, cite the findings of the US Commission on Civil Rights (USCCR). See, e.g., *Keyes*, 413 U.S. 189 at 197.
[80] 347 U.S. 483, at 494.

the children of the minority group of equal educational opportunities?", Warren's answer, appropriated from the record of the Kansas federal trial court, fails to demonstrate *how* educational opportunities are denied. His ensuing commentary provides little additional insight: "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, th[e] finding [that segregation harms blacks] is amply supported by modern authority." Appended to this sentence is the second most famous footnote in all of Supreme Court history, *Brown v. Board*, footnote 11. Following his assurance in that footnote that "modern authority" has dispelled any supposition that segregation is benign with respect to blacks, Warren then dramatically concludes in the body of the decision: "Any language in *Plessy v. Ferguson* contrary to this finding is rejected. We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[81]

Whether this reasoning is supported by the precedents that Warren has claimed produce it depends on the congruence of the harms Warren has identified with those of *Sweatt* and *McLaurin.* As we have already seen, there appears to be a perhaps insuperable discontinuity between the harm identified in *Sweatt* (denial of a concrete educational opportunity) and that in *Brown* (psychological harm or increased anxiety as to social status in the community). However, there appears to be a tenable connection between one of the two harms proscribed in *McLaurin* and the psychological harm Warren imputes to segregation. The irony, of course, is that Warren does not make the relationship explicit, emphasizing instead the connection between the psychological harms in *Brown* and the "intangible factors" that had played such a decisive role in the Court's analysis in *Sweatt*. Warren would have been on much stronger footing extricating clearly the harms of *McLaurin* and connecting them to *Brown*'s.

[81] Id., at 494-495.

The psychological harm of stigma or inferior status articulated in *Brown* has clear precedent in both interpretations of *McLaurin*. The first *McLaurin* reading, that the state cannot deny students equal educational opportunities on the basis of race, is implicit in the *Brown* harm to the extent the reader accepts, as Warren appears to believe the reader would, that educational practices that impose burdens on students do not provide educational opportunities equal to those available to individuals not so harmed. The second *McLaurin* reading, that the state cannot perpetuate social inequality, is implicit in the fact that the *Brown* harm is putatively produced by the denial of equal social status. Since *McLaurin* presented the far stronger support for *Brown*, why did Warren rely on a phrase originated in *Sweatt* to create the crucial precedential nexus on which *Brown*'s constitutional argument would rely?

Perhaps the immediate answer lies in the strategic value of the phrase "intangible factors." Shorn of its context in *Sweatt* (where the term clarified that the equal protection violation condemned was due to the non-fungibility of educational experiences in elite professional degree-issuing institutions), the phrase "intangible factors" acquires a high degree of abstraction in *Brown*, as was almost certainly Warren's intent in so appropriating the phrase. This high abstraction, in turn, is likely intended to preclude the need for a more-closely argued and cogent theory of equal protection, and, regardless of Warren's intention in deploying it, certainly affords the judge a high degree of latitude in assessing whether a given policy abides equal protection of the laws.

While the strategic value of locating the precedential nexus for *Brown* in "intangible factors" is clear, doing so entails a cost. Put plainly, finding a justification for a pathbreaking and controversial theory of equal protection in the ambiguous dicta of a recent decision detracts from the phrase's persuasiveness as a controlling authority for the constitutional questions raised in *Brown*. Certainly, deploying "intangible factors" is less persuasive and therefore less authoritative

(even if simpler) than extricating and applying one or both of the *McLaurin* readings. Moreover, the advantage to judicial discretion of the "intangible factors" standard is not clearly superior to the judicial latitude inherent in defining and assessing educational burdens under the first *McLaurin* reading, or social equality under the second. Accordingly, the higher cost, lower persuasiveness, and roughly equal strategic advantage of the Court's reliance upon "intangible factors" in lieu of the pregnant resources in *McLaurin* raise the question of whether Warren was even aware of the *McLaurin* interpretative possibilities. The evidence from the *Brown* conference discussions, to be discussed more extensively below, suggests not. And the clear persuasive superiority of the *McLaurin* tact to the one the Court took in *Brown* strongly points to the same conclusion.

What inference can be drawn on the basis of the foregoing discussion? In isolation, perhaps nothing other than the fact that Warren was not, at least at this early stage in his tenure as Chief Justice, an expert judicial craftsman——and that the associate justices were either lacking in fastidiousness as to the decision's constitutional reasoning, or prevented by some unknown cause from steering Warren's opinion writing process in a different, more "judicial" (or at least persuasive) direction. However, in the context of my account and analysis of the record of the *Brown* opinion writing process to follow, Warren's apparent ignorance of a superior constitutional alternative to the "intangible factors" route coheres with the available evidence suggesting that *Brown*'s outcome preceded the "discovery" or articulation of its constitutional rationale. In other words, Warren's reliance on a *weak* constitutional rationale suggests that constitutional reasoning did not lead him to the conclusion proffered in *Brown*, but was grafted on after Warren and the other justices had agreed on the outcome. Indeed, such is precisely what the available evidence suggests——including Warren's own reflections on the *Brown* decision-making process twenty years later.[82]

[82] See the discussion at fn 162, *infra*.

The Court's decision in *Brown* had to overcome what were, in the judicial context, usually fatal impediments to embracing a novel interpretation of the Constitution, especially when it displaced one of an established pedigree. *Stare decisis*, the longevity of the *Plessy* (58 years in 1954), the legislative history of the Fourteenth Amendment, and the evidence presented to the Court during the 1953 reargument focusing on the intentions of the Amendment's framers seemed to provide little affirmative support for overturning *Plessy* in the context of public education. In fact, the traditional, Frankfurterian sources of judicial interpretation (especially the history of the Fourteenth Amendment's proposal in Congress and ratification by the state legislatures), provided substantial support for sustaining *de jure* racial segregation in the context of education. At the same time, there were very few concrete historical supports for the proposition that the Fourteenth Amendment was designed or intended to eradicate social and educational inequalities of the kind *Brown* presented. The question for the justices, then, was whether the impediments were so massive as to prevent the Court from arriving at the only outcome that seven of the nine justices who voted in 1954 could countenance. To answer that question in the negative, to overcome the traditional judicial modalities pointing toward an affirmance of *Plessy*, the Court needed a powerful countervailing force. For Warren——as for the majority of the associate justices——that force was not the strength or clarity of the constitutional arguments overturning segregation, but segregation's self-evident injustice. Had it been the other way around, had the Court felt compelled to overturn segregation by a close reading and appropriation of the constitutional logic of the prior cases, Warren may have been able to produce a much stronger constitutional rationale.

The justices deciding *Brown* were deeply ambivalent about the precise constitutional logic and the nature and scope of the individual rights announced. This uncertainty about the constitutional holding dovetailed with their ambivalence about how to effectuate the ruling, even after a

year and the rehearing on remedy in spring of 1955. The only question on which they all (minus Justice Reed) agreed over the course of the three terms in which they considered the cases was that state-imposed racial segregation in American public life was bad, that it should be eradicated, and that the public should be put on notice that the federal judiciary was setting out to do just that. As author of both *Brown* opinions, Warren was spokesman and counsel for the Court's constitutional case for embarking on this ambitious and unprecedented endeavor. But in penning the first of the opinions, he unwittingly offered evidence that in *Brown* the cart came before the horse.

Chapter 3. The Social Intuitionist Model of Moral Decision-Making

> The Justices of the Warren Court [] ventured to identify a goal. It was necessarily a grand one——if we had to give it a single name, that name … would be the Egalitarian Society. And the Justices steered by this goal, as Marshall did by his vision of a nation, in the belief that progress, called history, would validate their course, and that another generation, remembering its own future, would imagine them favorably. Such a faith need not conflict with, but [] overrides standards of analytical reason and scientific inquiry as warrantors of the validity of judgment.
>
> ——Alexander Bickel[83]

OVERVIEW

Brown lacked what throughout this work I have called a "robust theory" of equal protection. As Jack Balkin puts it: "*Brown* was written the way it was because the details of the new theory of equality simply had not been worked out. That required the efforts of many lawyers, judges, politicians, legal scholars, and members of social movements in succeeding decades."[84] Balkin's remark highlights the distinctively *political* character——political both in the essential sense of who rules whom, and in the derivative sense of moral discretion——of, respectively, *Brown*'s import and its provenance. The Court's decision was at that time in history the loudest shot across the bow of white America that it could not, and would not, rule black America differently than it ruled itself, or at least (as subsequently developments would soon evince) not to the

[83] Bickel (1970, 13-14).
[84] Balkin (2011, 140).

disadvantage of the latter. It was a declaration that while majorities ostensibly rule, their laws operate not on minorities as minorities but on all citizens as individuals——such, I take it, is the significance of Warren's soliloquy in *Brown* on the role of modern education in forging a common citizenship. And for all future cases containing a racial dimension and posing the primordial political question, Who rules?, *Brown* effected and promulgated notice of a recasting of the Fourteenth Amendment into a license for answering that question with three words: the federal judiciary.

The political character of *Brown*'s meaning and effect is a function of the political cast of the *Brown* decision-making process. *Brown* was written absent a robust theory of equal protection because the decision to reach the outcome in *Brown* preceded the articulation of a constitutional case for that outcome and was primarily motivated by elements of moral psychology. The justices' individual decision processes were *moral* because their concerns were expressed in the form of claims about justice or fairness, which imply a theory of normativity rather than legality or constitutionality. Normativity and legality/constitutionality can be related, and the central purpose of many jurisprudential schools is to perform precisely that task. My analysis will nonetheless show that the normative concerns entertained by the justices deciding *Brown* generally preceded constitutional and legal ones, and that the justices lacked coherent, generalizable, and articulable jurisprudential philosophies (as opposed to ad hoc judicial approaches) that would allow the justices to incorporate their personal moral views as inputs to the judicial process. Moral judgment preceded, motivated, and caused constitutional and legal theorizing, not the other way around. Furthermore, the available evidence strongly suggests that the decisive considerations for each justice were of an affective or social nature. By affective I mean driven or powerfully mediated by emotion; by social, I mean driven or powerfully mediated by the interpersonal dynamics of group membership and considerations of institutional solidarity.

The theory of moral psychology that best coheres with the available *Brown* primary source record is Jonathan Haidt's social intuitionist theory of moral cognition. Haidt's account echoes an older but still-modern philosophic account of the soul developed by David Hume[85] and, judiciously applied, helps capture and articulate what happened in the *Brown* merits decision-making process, from the time the cases were first argued in December, 1952 until the unanimous *Brown* decision came down on May 17, 1954. Haidt has argued that for most people most of the time, "moral judgment is caused by quick moral intuitions and is followed (when needed) by slow, ex post facto moral reasoning" or rationalization.[86] In the words of Joshua Greene, a colleague and occasional collaborator of Haidt's, "moral judgment is driven primarily by rapid, affectively based, intuitive responses, with deliberate moral reasoning engaged after the fact to provide rational justifications in response to social demands."[87]

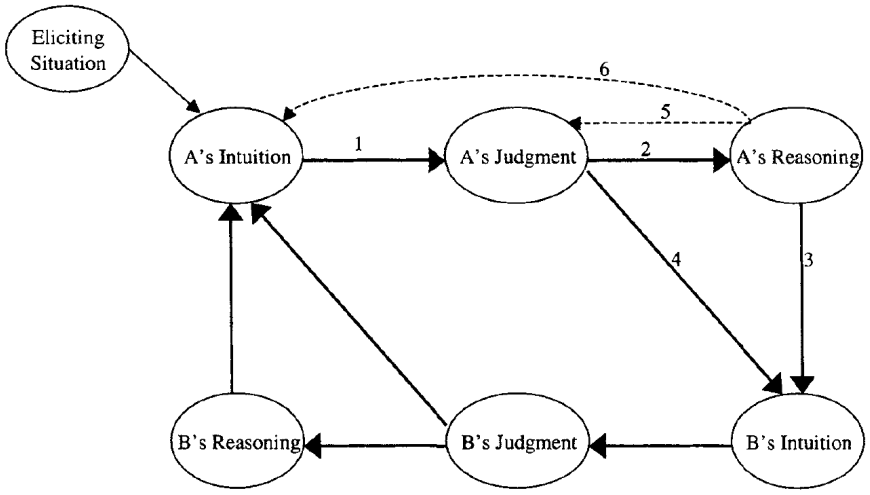

Figure 1. The Social Intuitionist Model of Moral Judgment

[85] Hume ([1739], 1896, 413-418).
[86] Haidt (2001, 817).
[87] Greene et al. (2004, 397).

"The number links, drawn for Person A only, are (1) the intuitive judgment link, (2) the post hoc reasoning link, (3) the reasoned persuasion link, and (4) the social persuasion link. Two additional links are hypothesized to occur less frequently: (5) the reason judgment link and (6) the private reflection link."[88]

The "social intuitionist" model proposed by Haidt gives the following account of moral judgment. Moral judgment begins when a subject confronts an eliciting stimulus that induces an intuitive response (e.g., fear, anger, joy, disgust). The tenor of that reaction then determines the subject's disposition toward the stimulus (e.g., good, bad, ambivalent), which is to say, the subject's moral judgment (Link 1). The subject then engages the rational or linguistic faculty to develop a cogent set of arguments that justifies the judgment to other people, especially when the subject is pressed to explain himself (Link 2). Haidt claims that this link correlates with intelligence: as David Perkins and colleagues have found,[89] people who have the most sophisticated and plausible arguments for their judgments tend to be those with an especially high IQ, independent of the content of their judgments. Haidt acknowledges that private contemplation sometimes alters moral judgments, but such reflection usually does so by eliciting new intuitions, which then change the judgment (Link 6). Rarest of all, however, is that form of cognition that rationalist philosophers long imputed to moral judgment, and from which they claimed to derive Reason's autonomy: reasoned judgment (Link 5). Haidt suggests that reasoned judgment is possible in principle, but rare in practice.

[88] Haidt (2001, 815). Both figure and figure label are Haidt's.
[89] Perkins et al. (1991).

> The literature on everyday reasoning suggests that [reasoned judgment] may be common only among philosophers, who have been extensively trained and socialized to follow reasoning even to very disturbing conclusions (as in the case of Socrates or the more recent work of Peter Singer), but the fact that there are at least a few people among us who can reach such conclusions on their own and then argue for them eloquently (Link 3) means that pure moral reasoning can play a causal role in the moral life of a society.[90]

In a word, emotion or intuition, not Reason, directly determines moral judgment; private, rational reflection can sometimes elicit new intuitions that may then alter judgment, but rarely operates directly upon judgment.

Finally, intuitive judgments tend to be of an automatic, rapid-fire, language-free nature. Haidt argues that people experience dozens of intuitive "flashes" daily, and that these form the seeds from which the majority of moral judgments grow. He calls this cognitive process the "seeing-that" faculty, analogizing these flashes to automatic cognitive processes such as visual perception.[91]

> The next time you read a newspaper or drive a car, notice the many tiny flashes of condemnation that flit through your consciousness. Is each such flash an emotion? Or ask yourself whether it is better to save the lives of five strangers than one (assuming all else is equal). Do you need an emotion to tell you to go for the five? Do you need reasoning? No, you just see, instantly, that five is better than one. *Intuition* is the best word to describe the dozens or hundreds of rapid, effortless moral judgments and decisions that we all make every day. Only a few of these intuitions come to us embedded in full-blown emotions.[92]

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[90] Haidt (2001, 829).
[91] Haidt (2013, 48).
[92] Id., at 53.

Haidt argues that "almost *everything* we look at triggers a tiny flash of affect" and "affective reaction are so tightly integrated with perception that we find ourselves liking or disliking something the instant we notice it, sometimes even before we know what it is."[93] As a consequence, *most people are not conscious of the process by which they reach moral judgments* because they are largely unconscious of automatic cognitive processes, and an automatic cognitive process producing barely discernible flits of intuition plants the seed out of which the majority of people's moral judgments grows. Moreover, since the process of moral decision-making tends to be opaque to the person performing or (to state the matter perhaps more accurately) undergoing it, people tend to believe the reasons they found to rationalize a pre-existing judgment "are the reasons for"——that is, preceded and caused——that judgment, rather than post hoc defenses of the outcome of a non-rational process. People want to and do believe that reasons are the causes and not the effects of their moral judgments.

Such is the "intuitionist" element of the social intuitionist model. The "social" component refers to the implications of the intuitive character of moral decision-making for interpersonal persuasion and communication. In a nutshell, the social component holds that because almost all moral decision-making turns on intuition, not rational calculation, people are generally unresponsive to arguments or facts alone when considering an emotionally salient matter, that is, any subject on which they have any firm prior opinion (because to have formed an opinion in the first place, they had to have experienced an intuition that induced the formation of that opinion). The model predicts that the primary way in which countervailing claims and evidence alter an existing opinion is by eliciting new intuitions that then change the subject's judgment. Nonetheless, absent a countervailing intuition, not only will the subject's opinion remain unchanged, but also the subject's

[93] Id., at 65. See in particular Zajonic (1968).

rational or linguistic faculty will seek novel supporting arguments and evidence to defend the existing opinion and dismiss the new, countervailing arguments or information to which the subject has been exposed.

This hypothesis is supported by recent experimental findings in psychology on group polarization, performance on the Wason selection task, average ability to assess emotionally-neutral logic puzzles (e.g., syllogisms), confirmation bias, motivated reasoning, the rationalization of immoral behavior, and the discontinuity between reasoned deliberation and optimal decision-making. "People who have an opinion to defend don't really evaluate the arguments of their interlocutors in a search for genuine information but rather consider them from the start as counterarguments to be rebutted."[94] Reasoning, then, has a naturally argumentative cast, and, Haidt and others hypothesize, evolved to help people "to put forward arguments to defend their decisions and actions," and to help them "reason proactively to that end." In the cases of motivated reasoning (as when a person discounts or exaggerates information to cohere with his preexisting desires or preferences), biased assimilation (as when, e.g., a subject selectively attacks the methodology of a study whose conclusions he disfavors, while raising no such qualms about the similar or identical methodology of a study whose conclusions he favors), group polarization (as when pre-existing ideological commitments are rendered more extreme by discussion with like-minded individuals), and the rationalization or excusing of moral violations to preserve self-conception, "epistemic or moral goals are not well served by reasoning. By contrast, argumentative goals are: People are better able to support their positions or justify their moral judgments."[95]

[94] Mercier and Sperber (2011, 69).
[95] Id., at 68.

To illustrate this mechanism in the context of interpersonal deliberation, Haidt offers the following analogy. A person's intuition is to her reason (or, more accurately, the rationale-discovering component), as a president is to his press secretary. The president is the undisputed boss and sets the agenda, almost always without any substantive input from his press secretary. The press secretary is the chief rationalizer and apologist par excellence for the president's agenda. The secretary has negligible agency in the policies and actions he defends and is singularly guided by the imperative to ferociously justify every action of the president, and aggressively cast every fact in the most helpful light to the president and his agenda. The president is intuition. The press secretary, obviously, is language or reason. Haidt contends that rational calculation performs a hyperactive, rationalizing and apologetic function in the service of intuition, and thereby tends to frustrate even good faith efforts to discover the truth. In short, the very way in which people acquire and process information that impinges upon a pre-existing opinion is almost always subject to the distorting influence of their intuitions, hopes, and expectations about those subjects, and reason is only too happy to render that information compatible with its boss's sentiments. The stronger the intuition and the more incongruent the information is with it, the more extreme (or creative) the distortion tends to be.[96]

Haidt offers his social intuitionist model as an alternative to the rationalist model of moral judgment, which has its roots in Plato's exoteric account of the soul and was refined over the course of 2,300 years of western intellectual development until crystallized as an operational psychological account by mid-20th century psychologists Lawrence Kohlberg and Jean Piaget.[97]

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[96] Haidt (2013, 91-92).

[97] See, e.g., Kohlberg (1969) and Piaget ([1932] 1965).

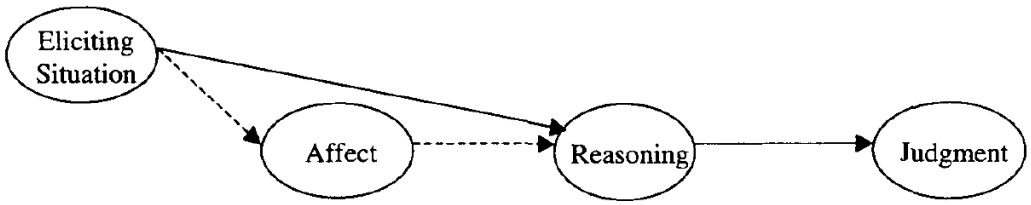

Figure 2. The Rationalist Model of Moral Judgment

"The rationalist model of moral judgment. Moral affects such as sympathy may sometimes be inputs to moral reasoning."[98]

The rationalist model holds that moral judgment is primarily the product of reasoning or calculation. "Moral emotions such as sympathy may sometimes be inputs to the reasoning process, but moral emotions are not the direct causes of moral judgments. In rationalist models, one briefly becomes a judge, weighing issues of harm, rights, justice, and fairness, before passing judgment []. If no condemning evidence is found, no condemnation is issued."[99] As the legal cast of Haidt's description appropriately suggests, the rationalist model of moral judgment is an analog for the legal model of judicial behavior. However, as Haidt's cursory and vague analogy of the balancing process to judicial reasoning also implies, the calculations performed therein, and the rules they abide, are unspecified. Perhaps, therefore, even that truly rarest of phenomena——genuine moral reasoning——is not entirely free of non-rational elements, such as the hierarchy and relative weights of the issues that the "judge" must balance.

In the lexicon of political science, the social intuitionist model applied to judicial behavior falls under the aegis of the attitudinal model of judicial decision-making, but with a twist: the social intuitionist model predicts that judges are susceptible to judicial *esprit de corps* or what

[98] Haidt (2001, 815). Both figure and figure label are Haidt's.
[99] Id., at 814.

Haidt calls "groupishness,"[100] and that their identity as judges and members of the judiciary, or as members of a particular subset of the judiciary (e.g., particular courts or factions within a court), strongly mediates their moral judgments. Likewise, the rationalist model falls under the umbrella of the legal model of judicial decision-making, and predicts that judges will arrive at outcomes by dispassionately weighing the elements of legal interpretation and constitutional construction to determine "what the law says."

The social intuitionist model accounts for what is known about the justices' decision-making in *Brown* better than does the rational model, and, for that matter, any other model of judicial or moral decision-making. However, this is not to say that all of the justices' behavior can be accounted for by social-intuitionism: owing to the unusual degree of secrecy in which the *Brown* deliberations were shrouded,[101] much of the decision-making process is simply lost to history. I remain open to the possibility that the unrecorded portion of the justices' conduct and considerations that culminated in the *Brown* decision might be better accounted for by models other than the social intuitionist one.[102] But the evidence that has survived for the examination of posterity, I contend, supports my thesis.

Now if the social intuitionist model can tell us something about the justices' behavior in *Brown*, then it can also explain much, though not all, of the decision's peculiar rhetoric and reasoning, and, to the extent it does that, even elucidate the Court's holding. After all, if the legal holding of a court decision is at least a partial function of the meaning of the words of the majority opinion, and that meaning is a partial function of the intentions and understandings of those who

[100] Haidt (2013, 100-103; 219-255).
[101] Ulmer (1971, 699-700).
[102] Hockett (2013) speculates that non-instrumental factors may have significantly influenced the justices' votes in *Brown*, but generally provides little direct evidence for this claim.

composed them, then it follows that the designs and understandings of the justices participating in *Brown* is partially constitutive of the decision's meaning. The elusive meaning of *Brown* depends in part on the character of the moral reasoning in which the justices engaged. By this I do not mean that *Brown*'s holding turns on the specific forms of moral argument that the justices deployed in their conference discussions, or those that eventually appeared in Warren's final written opinion for the Court. More important——and authoritative for future judicial action——than either of those factors was the *decision-making process* that *Brown* legitimated. It is for that reason that ascertaining the modes of the justices' decision-making, not just their putative constitutional reasoning, is a central goal of this work.

I propose to make this case by performing the following tasks. First, I will survey the behavioral characteristics that Haidt imputes the cognitive dynamics described by his model. Second, I will evaluate the justices' behavior in *Brown* against the behavioral characteristics identified by Haidt. Third, I will evaluate that behavior against the rationalist model of moral judgment, and, when such conduct appears to conflict with that account, offer assessments of how the justices' behavior differs from the predictions that rationalist model makes of moral judgment. Over the course of steps two and three, I hope to establish to a high degree of probability that the justices' behavior conforms substantially to behavior predicted by the social intuitionist model. Fourth and finally, I will expound upon the implications of the finding that the justices' behavior conforms to the social intuitionist model for the constitutional holding in *Brown* and for certain lines of reasoning and rhetorical choices in the decision itself. The first three tasks are performed in Chapters 4, 6, and 7; the last, in Chapter 8.

BEHAVIORAL CHARACTERISTICS OF THE SOCIAL INTUITIONIST MODEL

The behavioral characteristics that Haidt adduces for the social intuitionist model pertain to people's ability to make and defend decisions, reason perspicaciously, adjust their opinions to evidence that contradicts them, cope with cognitive dissonance (mental discomfort caused by the simultaneous possession of contradictory beliefs), and demonstrate understanding of their own decision-making and reasons. Haidt argues that measured by these criteria, people's performance is generally dismal: people tend to be much better at finding novel reasons to defend their prior beliefs (rationalization) than at seeking the truth or adjusting their beliefs to comport with new information. Haidt speculates that this is because reasoning and language——whose unity was presciently detected and reflected, e.g., in the Ancient Greek word, *logos*——evolved in relatively recent human prehistory "to help us pursue socially strategic goals, such as guarding our reputations and convincing other people to support us, or our team, in disputes,"[103] not to discover the truth or to reason accurately. At the risk of oversimplification, speech and reason developed initially because people who could communicate could better cooperate in groups to survive (in what Haidt suggests is "group selection").[104] Then, people who could speak better than others used language to accrue relative advantage——both reproductive and otherwise——with respect to their peers ("individual selection").[105] In other words, Haidt hypothesizes that as the human brain evolved the capacity for language, it simultaneously evolved a capacious architecture for using language for social ends; the mind's development of a concomitant architecture for epistemological (truth-seeking) ends was, in contrast, a fortuitous byproduct of that evolution. Speech used in the employ of

[103] Haidt (2013, 87).
[104] Id., at 222 and 238.
[105] Id., at 222.

Science or Reason is relatively anomalous and of very recent provenance. Speech used as a tool for survival and status jockeying is much older and more ubiquitous.

Social scientific experiments provide evidence probative of Haidt's assessment of human reasoning. For example, Jennifer Lerner and Phil Tetlock have shown that when subjects are tasked to solve problems or make decisions with prior knowledge that they will not be required to justify their actions, the quality of their decisions is poor, exhibiting "the usual catalogue of errors, laziness, and reliance on gut feelings that has been documented in so much decision-making research." However, when subjects are informed prior to making a decision that they will have to defend their decisions to an audience, the quality of their decision-making and reasoning improves, and subjects even show a willingness to revise their initial conclusions and assumptions. Tetlock observed that when all of three conditions apply, people tend to become disinterested and successful truth seekers: "(1) [when] decision makers learn before forming any opinion that they will be accountable to an audience, (2) [when] the audience's views are unknown, and (3) [when] they believe the audience is well informed and interested in accuracy." Absent one or more of the three conditions, subjects tended to engage in "confirmatory thought," or "a one-sided attempt to rationalize a particular point of view."[106] On the basis of these experimental results, Lerner and Tetlock drew the following conclusion.

> A central function of thought is making sure that one acts in ways *that can be persuasively justified or excused to others*. Indeed, the process of considering the justificability of one's choices may be so prevalent that decision makers not only search for convincing reasons

[106] Haidt (2013, 88).

> to make a choice when they must explain that choice to others, they search for reasons to convince themselves that they have made the "right" choice.[107]

The authors' findings raise the question of self-deception. In making decisions and judgments, to what extent do people delude themselves in order to minimize cognitive dissonance? A host of studies on cheating and dishonesty speak to this question. When experimental subjects are tasked to play a game in which their performance can earn them a variable amount of money, those subjects afforded plausible deniability and the opportunity to cheat do so at very high rates. In contrast, when subjects playing the same game are given precisely the same opportunity to cheat, but denied plausible deniability, those subjects cheat at much lower frequencies. Importantly, the subjects who do cheat in the first scenario do not try get away with the maximum possible level of fraud, but cheat "just a little bit." Haidt construes this finding to suggest that when afforded the opportunity to cheat and effective indemnity from discovery, people "cheat[] only up to the point where they themselves could no longer find a justification that would preserve their belief in their own honesty."[108] By and large, people want to be moral, and will accordingly rationalize and excuse their own indiscretions to minimize cognitive dissonance. Therefore, to preserve the cogency of their worldview and self-conceptions, people unconsciously and automatically assimilate information to their beliefs——manipulating or discounting it when it conflicts with their beliefs, amplifying and extending it when it coheres——rather than the other way around. When people assimilate information about their own actions to their self-conceptions, they run the risk of self-deception.

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[107] Lerner and Tetlock (2003, 433).
[108] Haidt (2013, 96-97).

A related psychological phenomenon is confirmation bias, or "the tendency to seek out and interpret new evidence in ways that confirm what [a person] already think[s]." Confirmation bias can operate in the absence of distorting moral beliefs and in the presence of an accuracy goal. The Wason selection task demonstrates the emotionally-neutral and truth-seeking contexts in which confirmation bias can operate. Wason "showed people a series of three numbers and told them that the triplet conforms to a rule. They had to guess the rule by generating other triplets and then asking the experimenter whether the new triplet conformed to the rule. When they were confident they had guessed the rule, they were supposed to tell their experimenter their guess." People could quickly offer numbers that adhered to the underlying pattern, but usually did not think to offer numbers that might disconfirm any of their hypotheses about the rule.

Suppose a subject first sees 2-4-6. The subject then generates a triplet in response: "4-6-8?"

"Yes," says the experimenter.

"How about 120-122-124?"

"Yes."

It seemed obvious to most people that the rule was consecutive even numbers. But the experimenter told them this was wrong, so they tested out other rules: "3-5-7?"

"Yes." […]

"OK, so the rule must be any series of numbers that rises by two?"

"No."

People had little trouble generating new hypotheses about the rule, sometimes quite complex ones. But what they hardly ever did was to test their hypotheses by offering triplets that *did not conform to their hypothesis*. For example, proposing 2-4-5 (yes) and 2-4-

> 3 (no) would have helped people zero in on the actual rule: any series of ascending numbers.[109]

Confirmation bias can therefore plague any truth-seeking endeavor in which the investigator proceeds without a clear, articulated prior hypothesis, and without making a conscious effort to identify the kind of data that would falsify that hypothesis, and test his hypothesis against such data.

A phenomenon related to confirmation bias is motivated reasoning. Social psychologist Tom Gilovich authored an operational description of motivated reasoning with the following thought experiment, as recounted by Haidt.

> [W]hen we *want* to believe something, we ask ourselves, "*Can* I believe it?" Then, we search for supporting evidence, and if we find even a single piece of pseudo-science, we can stop thinking. We now have permission to believe. We have a justification, in case anyone asks. In contrast, when we *don't* want to believe something, we ask ourselves, "*Must* I believe it?" Then we search for contrary evidence, and if we find a single reason to doubt the claim, we can dismiss it. You only need one key to unlock the handcuffs of *must*.[110]

Motivated reasoning, then, often transpires when a person's attitude guides or distorts his reasoning, and can be said to occur when an individual encounters information about which that person has a pre-existing motivation (i.e., a desire, expectation, or wish). Motivated reasoning minimizes cognitive dissonance by discounting information that conflicts with the person's prior beliefs (Peter Ditto and David Lopez call this particular form of motivated reasoning "motivated skepticism,"[111] but I will adhere to the more widely-used term throughout this work.) For example,

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[109] Id., at 92-93 (emphasis Haidt's).
[110] Id., at 98 (emphasis Haidt's).
[111] Ditto and Lopez (1992).

"[w]hen people read a (fictitious) scientific study that reports a link between caffeine consumption and breast cancer, women who are heavy coffee drinkers find more flaws in the study than do men and less caffeinated women."[112] Haidt remarks that the effects of motivated reasoning are so powerful that they even affect visual perception, again suggesting a link between the "seeing-that" nature of intuition and lower-order cognitive processing involved in sense perception. Experimental "[s]ubjects who thought that they'd get something good if a computer flashed up a letter rather than a number were more likely to see the ambiguous figure  as the letter *B* rather than the number 13. [] People can literally see what they want to see."[113]

Similarly, merely thinking about an object has been observed to strengthen pre-existing attitudes toward it, in a phenomenon known to psychologists as attitude polarization. Experimental studies have found that both "the time spent thinking about an item" and "the motivation to think" about an item increase polarization.[114] Studies that tasked participants with writing an essay about an opinion to which the participants already subscribed found not only that polarization occurred, but also that "it was correlated with the direction and number of the arguments put forward in the essay. These results demonstrate that reasoning contributes to attitude polarization and strongly suggest that [reasoning] may be [attitude polarization's] main factor."[115] Further support for this contention comes from experiments that have found that subjects who commit publicly to an opinion, or know that they will need to defend it to an audience, exhibit high degrees of subsequent attitude polarization, in an effect known as bolstering.[116] In other words, the omnipresent desire to preserve or improve self-conception and reputation ossifies opinions that are connected to both.

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[112] Ibid.
[113] Id., at 99.
[114] Tesser and Conlee (1975) and Jellison and Mills (1969).
[115] Chaiken and Yates (1985) and Liberman and Chaiken (1991) *accord* Mercier and Sperber (2011, 67).
[116] Lambert et al. (1996), Millar and Tesser (1986), and Lerner and Tetlock (1999).

Other studies have found that people are generally competent argument evaluators, especially when motivated, but very poor producers of arguments that conflict with their own opinions.[117] This would confirm Haidt's hypothesis that reasoning is primarily confirmatory of intuition rather than truth-seeking: a capacious ability to defend one's opinions combined with an inveterate failure to anticipate and address weaknesses in one's own arguments suggests that reasoning's primary function is to rationalize, rather than discover the truth, which would presumably benefit from, and might even be impossible to discover without, adjudicating conflicting ideas.

Despite Lerner and Tetlock's findings that accountability can increase the epistemic quality of reasoning, the catalogue of errors and distortions in reasoning to which people are prone in private is actually exacerbated by some group and social settings. When a group is tasked with solving a "logical or, more generally, intellective" problem "for which there exists a demonstrably correct answer within a verbal or mathematical conceptual system" the usual outcome is that "*truth wins*, meaning that, as soon as one participant has understood the problem, she will be able to convince the whole group that her solution is correct."[118] However, when the task is performed by an ideologically, morally, culturally, or politically homogeneous group——as sometimes happens in "multimember courts, juries, political parties and legislatures[,] not to mention ethnic groups, extremist organizations, terrorists, criminal conspiracies, student associations, faculties, institutions engaged in feuds or 'turf battles,' workplaces, and families"——an effect called group polarization occurs.

Cass Sunstein describes group polarization as a phenomenon in which "*members of a deliberating group predictably move toward a more extreme point in the direction indicated by the*

[117] Mercier and Sperber (2011, 61-62).
[118] Id., at 62.

member's predeliberation tendencies." The effect is more likely "[w]hen like-minded people are participating in 'iterated polarization games,' [that is,] when they meet regularly, without sustained exposure to competing views" and the effect is more pronounced "for groups with some kind of salient shared identity (like Republicans, Democrats, and lawyers, but unlike jurors and experimental subjects.)"[119] In a word, homogeneity within a group on any particular question tends to transform that group into an echo chamber with respect to the question, with negligible capacity for simulating the perspectives necessary to generate counterarguments to the prevailing view. Sunstein suggests two reasons for this effect. On the one hand, "people want to be perceived favorably by other group members, and also to perceive themselves favorably." To achieve both goals, people "adjust their opinions in the direction of the dominant position" within the group. "[I]ndividuals move their judgments in order to preserve their image to others and their image to themselves." On the other hand, "any individual's position on an issue is partly a function of which arguments presented within the group seem convincing." But since the pool of available arguments in the group is limited, and is moreover skewed toward an outcome that members of the group already prefer, the opinions of group members will tend to become more extreme.

Sunstein offers some "refinements" to this account. First, he acknowledges that group polarization is not inexorable but probabilistic——certain conditions must obtain, such as the presence of persuasive primary interlocutors, and the effect can be curbed by the desire of some group members to maintain a moderate visage before their peers and forestalled entirely by things such as exogenous shocks to the group. Second, "affective factors, identity, and solidarity" will augment group polarization. When group members are "linked by affective ties, dissent is significantly less frequent" because such ties tend to preclude the development of countervailing arguments and

[119] Sunstein (2002, 176).

strengthen the effect of social dynamics on group deliberation and shifts in opinion. "[T]he likelihood of a shift, and its likely size, are increased when people perceive fellow members as friendly, likeable, and similar to them. In the same vein … a sense of common fate and intragroup similarity tend to increase [polarization], as does the introduction of a rival 'outgroup.'" Indeed, "when group members think of one another as similar along a salient dimension, or if some external factor (politics, geography, race, sex) unites them, group polarization will be heightened."[120]

In sum, ideologically committed individuals are highly attuned to errors of an ideologically unfriendly provenance, while being appreciably handicapped with respect to detecting erroneous reasoning from a friendly source. Thus, truth-finding is unlikely to occur under conditions in which many people are working together, ideology is salient, the majority of those people share the same ideology, and one or more objects of the truth-seeking relate to any part of the shared ideology, since ideological co-partisans exercise very little scrutiny of information consistent with, and flaws in, their own views, while remaining highly attuned to and desirous of finding flaws in information that contradicts their views. The deleterious consequences for truth-finding are equally applicable when philosophy, religion, morality, or any other human value system substitutes for ideology.

The conclusion that Haidt draws from the literature on reasoning in group contexts is that human beings are profoundly group-oriented, and reasoning operates to shore up members' individual standings within the group, and especially to strengthen the group vis-à-vis other groups. Such reasoning is *motivated* by a desire for group solidarity and cohesion and therefore tends to distort the truth. Again, this is consistent with the social intuitionist model's claim that emotions and intuition guide reasoning. When group membership and competition becomes salient, as in

[120] Id., 180-181.

politics, people's concern for the groups to which they belong is heightened, sometimes dramatically, and what economists have called "rational" (i.e. individual) self-interest fades into the background. Haidt observes:

> Many political scientists used to assume that people vote selfishly, choosing the candidates or policy that will benefit them the most. But decades of research on public opinion have led to the conclusion that self-interest is a weak predictor of policy preferences…. Rather, people care about their *groups*, whether those be racial, regional, religious, or political. The political scientist Don Kilmer summarizes the findings like this: "In matters of public opinion, citizens seem to be asking themselves not 'What's in it for me?' but rather 'What's in it for my group?' Political opinions function as "badges of social membership." They're like the array of bumper stickers people put on their cars showing the political causes, universities, and sports teams they support. Our politics is groupish, not selfish.[121]

In Haidt's summation, "*human beings are conditional hive creatures*. We have the ability (under special conditions) to transcend self-interest and lose ourselves (temporarily and ecstatically) in something larger than ourselves."[122]

From these studies, it is possible to derive a series of testable hypotheses that will enable us to evaluate whether and to what degree the justices who decided *Brown* exhibited behavior conforming to the social intuitionist model.

1 [Intuition as causative of reasoning.] The first and most important hypothesis is that, if indeed the social intuitionist model is applicable in *Brown*, the justices decided the merits of the case by intuition or emotion and afterward rationalized the outcome. To put this in more precise

[121] Haidt (2013, 100).
[122] Id., at 222.

terms, we might say that if the model controls, the evidence will show that the case's outcome temporally preceded and guided the constitutional or legal reasoning deployed. Moreover, this would not just hold for Warren's decision-writing process, but would also be evident in the justices' conference discussions, interchamber memoranda, records of private conversations and reflections, and other primary source materials.

2 [Opacity of judgment.] The third hypothesis is that the justices will fail to understand their own decision-making. Such evidence would consist of a justice's description of or reference to his own decision-making that contradicts the record of how the justice in question actually made the decision. I will examine the record with a special view to the order in which judgment and reason take place, and the justices' own understandings of the relationship between the two. For example, if a justice claims to have been persuaded by argument X for his vote, but exhibited a propensity for the position that he ultimately endorsed without ever mentioning argument X, then it is at least possible argument X was a post hoc rationalization. The determination of whether any particular justice understood his own decision-making will necessarily depend on the available record, and in many cases, it may not be possible to make an assessment.

3 [Confirmation bias.] The fourth hypothesis is that the justices will focus excessively on supporting evidence for their position, while failing to lend much consideration to countervailing information. Evidence of reflection about or reasoned discussion of such information, even if such consideration leads ultimately to dismissal of that information, qualifies as disconfirmation of this hypothesis.

4 [Motivated reasoning.] The fifth hypothesis is that the justices will tend to discount information inconsistent with their preferences. This hypothesis differs from the previous one in that confirmation bias suggests that the justices will tend to see only information consistent with their

position, while motivated reasoning suggests that justices, when forced to confront information that contradicts their position, after cursory consideration, will find excuses to dismiss it.

5 [Attitude polarization.] The sixth hypothesis is that private, individual reflection by a justice on a question connected to the case, especially its outcome, will cause the justice's initial position on the question over time to become more extreme.

In addition to the above SI model correlates, the following are psychological phenomena that are not unique to social intuitionism but that were nonetheless observed in the justices' decision-making and help explain it.

6 [Group polarization.] The seventh hypothesis is that the average position of the justices on the matters addressed in *Brown* will become more pronounced in the direction in which that position pointed initially as a result of the justices' ongoing consideration of the case. In the specific context of *Brown*, this is to say that the model predicts that the justices will become more favorable to desegregation over time, since the largest bloc of justices at the 1952 conference (a 4-justice plurality) favored desegregation.

7 [Role of exacerbating factors in group polarization.] The eighth hypothesis is that affective factors (e.g., interpersonal relations among and between justices), identity, solidarity, and the existence (if any) of "recurrent polarization games" will render the Court's position on desegregation more extreme over time. For instance, it is possible that the personal warmth and charisma of Chief Justice Warren affected the other justices' views of desegregation and race-related questions. Additionally, it is almost certain that the conflict between the federal judiciary and the South (and especially the most salient apologists for its segregationist policies, e.g., Alabama Governor George Wallace, Arkansas Governor Orval Faubus, and Mississippi Governor Ross Barnet) made

the Court's position more extreme in certain desegregation decisions. *Cooper v. Aaron*[123] is the most famous example of a controversy in which the position the justices took initially was made more extreme by the perceived threat to the Court's institutional legitimacy and power by the defiance of an outgroup.[124] Finally, the Washington, D.C. elite social milieu to which all the justices were exposed during their service probably had the effect of an "iterative polarization game" on their views on a plethora of constitutional questions, not merely desegregation.

8 [Solidarity]. The ninth hypothesis is that when confronted with a threat from another group (e.g., the South's noncompliance and attacks on the legitimacy of the federal courts' desegregation efforts), the federal judiciary will respond by becoming more insistent upon the course that had precipitated the threat (desegregation) and more extreme in the measures it authorizes and undertakes to produce it.

I contend that the social intuitionist model captures elements of each justice's behavior in the *Brown* decision-making process. However, as Jeffrey Hockett has contended, the *Brown* decision-making process is also partially explicable via more traditional models of judicial behavior, especially rational choice. I join in Hockett's assessment. I believe, though, that Hockett underestimates the role of attitudinal factors in the decision. He claims that because scholars lack independent and direct means of measuring justices' preferences, attitudinalists often fail to meet their burden of showing that the justices' attitudes *caused* the outcome. Instead, "'there is a kind of basic circularity' in the attitudinal model since 'consistency in voting behavior is used to infer the attitude, and then the attitude is used to explain the consistency.'"[125] Accordingly, "marshaling evidence of the justices' values regarding the matter of racial equality would seem to be of some

[123] 358 U.S. 1 (1958)
[124] See Hutchinson (1980, 73-86).
[125] Hockett (2013, 38).

importance to an attitudinal account of *Brown*."[126] But this task is complicated, if not rendered impossible, by the justices' having passed. "[U]nless social scientists develop an alternative method of attitude measurement that is not restricted to living persons," Hockett concludes, "an attitudinal account of *Brown* will remain a matter of conjecture rather than empirical proof."[127]

Hockett is correct in this narrow sense: an attitudinal account of *Brown* will never be totally incontrovertible, unless, as is extremely unlikely, there exists documentary or other corroboration that has not yet been made available to scholars. However, as with many important questions——indeed, as with perhaps the *most* important questions in life——necessity forces us to rest satisfied with partially-illumined probabilistic calculations rather than the unadulterated sunlight of certain knowledge. And the social intuitionist model is an instrument that can raise the level of probability that certain elements contributed to, and accounted for more of, the *Brown* decision-making process, than others. The model can do this in the same way that present-day physicians can establish or increase the likelihood that the deaths of historical personages were caused by certain factors rather than others: by studying the suite of symptoms quintessentially attributable to a particular malady, and reason inductively from the historical record of the symptoms to a conclusion that a particular malady was the likely cause of the observed historical outcome. I contend that applied to judicial behavior, the social intuitionist model will function in the same way. The model provides a suite of behavioral "symptoms" (as I have attempted to summarize in the above nine hypotheses) that are characteristically attributable to a particular and ubiquitous form of human moral decision-making and reasoning. If many of the behaviors are observed, it can be concluded that the probability is high that such behaviors are evidence of the causes observed to induce the same

[126] Ibid.
[127] Id., at 55.

conduct in present-day subjects to whose preferences and brain mechanics psychologists and neuroscientists have access thanks to experimental devices such as attitude surveys and fMRI scans.[128] As the science of human decision-making has improved over the last half century, it has made possible not simply speculative interpretations of past human decision-making, but probabilistic calculations about the causes of past behavior.

Applied to the *Brown* decision-making process, the social intuitionist model suggests that for many (and perhaps a majority) of the justices, the case's outcome was first arrived at via moral considerations, and then post hoc rationalized in constitutional and legal terms. That is to say, the general template for the decision-making of those justices whose behavior the model encapsulates is as follows. First, the justice would decide that compulsory segregation and, especially, the way of life it stood for or symbolized——white supremacy, the racial animus of local white majorities, the continued subjugation of a historically downtrodden, identifiable racial minority——was morally reprehensible. Second, he would reflexively seek a constitutional argument that could be used to ban the practice. I believe that such is the inference we can draw from those justices who indicated a concern about segregation's injustice, immorality, or offensiveness when 1) there was a time lag between the justice's announcement of his position and development or presentation or a supporting rationale, 2) the justice's proffered rationale was unpersuasive, incoherent, or not germane to constitutional or legal factors, and/or 3) the justice exhibited indicators of confirmation bias or motivated reasoning. In the first instance, the lag would suggest (though, admittedly, not prove) that the justice did not possess a constitutional argument for his position prior to espousing it, indicating that his position on the case's outcome temporally preceded his legal or constitutional

[128] On the role of certain portions of the brain in moral decision-making, especially those known to process emotion, see generally Greene et al. (2001), Greene et al. (2004), Kilts (2006), and Haidt (2013, 39-40).

reasoning, or at the very least preceded his *complete* formulation of a legal or constitutional case that he viewed as persuasive. In the second instance, if the justice was willing to espouse a position with a weak argument, the chances are high indeed that the proffered reasoning was not the cause of his judgment. It is far more likely that a weak argument was ex post rationalized to justify a pre-existing intuition than it is that a weak or flawed argument genuinely persuaded a Supreme Court justice to adopt a position the argument was adduced to support. Finally, a justice's refusal or failure to address and refute evidence contradicting his position suggests the justice sought to minimize cognitive dissonance by finding evidence necessary to affirm his commitment to a pre-existing viewpoint (confirmation bias, or answering in the affirmative Haidt's low burden of proof question, "*Can* I believe it?") and/or by discounting countervailing evidence (motivated reasoning, or answering in the negative Haidt's high burden of proof question, "*Must* I believe it?").

Now, in conference, some justices stated their position (e.g., "segregation is immoral and unconstitutional") and then followed it with reasons for their conclusion. Such occurrences would not fall incontrovertibly under the aegis of the model, as it is possible that those justices' conclusions, though stated before the reasons, were compelled by the reasons each justice immediately provided thereafter——just as it is possible that the causality was in fact reversed. Whatever the direction of causality, such cases lack the evidence necessary to conclude that the originating justice was employing ex post rationalizations, and so I will not suggest that that he did. Evidence of hypotheses 2 through 5 will be construed as supportive of the model because the model was postulated in response to observations of those deficiencies and tendencies in reasoning, and each hypothesis captures an independently articulable manifestation of the cognitive dynamics described by the social intuitionist model when those dynamics have been applied to peculiar circumstances.

The suggestion that the Supreme Court's decision in *Brown* was ex post rationalized is not novel. But it has been downplayed in scholarly efforts to understand the *Brown* decision-making process, possibly because of the political stakes that attended uncharitable interpretations of *Brown* at the time many of these assessments were composed. The political war over desegregation was a hot one for four decades after *Brown* was handed down, and responsible commentators appeared not to want to offer analysis tending to delegitimize a decision that most people of good faith agreed achieved, as Justice Frankfurter remarked of *Brown* after it was decided, "a great good for our nation,"[129] even if it did so by imperfect means. An early and instructive lesson on this score arrived in 1958, when Judge Learned Hand, a close friend of Justice Frankfurter and a sympathetic ally in the fight for the civil rights of African Americans, criticized *Brown*'s reasoning in a lecture at Harvard Law School. Of Hand's reproach that in *Brown*, the Court had substituted its values for those of 17 state legislatures, Gerald Gunther observed: "Southern editorial writers quickly jumped on the bandwagon, cheering . . . Hand's criticism of *Brown*."[130] Judicial observers for the most part appeared subsequently to hedge any complaints about *Brown*'s constitutional rationale in order to deny to southern intransigents support for their most strident complaint: that *Brown* represented judicial lawlessness and the illegitimate usurpation, by a coterie of unelected do-gooders in Washington, of six decades of constitutional precedent.

Perhaps because of this tacit agreement not to rehash unnecessarily *Brown*'s constitutional reasoning, that *Brown* "smacked of politics rather than law"[131] has not, it seems to me, been emphasized in attempts to understand what *Brown* meant. Rather, as adherents of the social intuitionist model would be little surprised to discover, interpretations of *Brown* have tended to fall into

[129] May 20, 1954 Letter from Felix Frankfurter to Stanley Reed. Felix Frankfurter Harvard Law School Papers.
[130] Hockett (2013, 34).
[131] Id., at 35.

two camps, with liberals tending to proffer some form of anti-subordination reading (*Brown* bans the subjugation of minorities, and permits or requires race-conscious state action to remedy the violations *Brown* condemns) and conservatives tending to advance an anti-classification construction (*Brown* prohibits state action on the basis of race). The views expressed in the dueling opinions of Chief Justice Roberts and Justice Breyer in *Parents Involved v. Seattle School District No. 1*[132] comprise effusive illustrations of these two most common approaches. However, neither school of thought takes seriously the possibility that as a precedent, *Brown* means little to nothing at all.

I contend that *Brown* was solely intended and written to reach an outcome. And that outcome was to the very narrow question, "Is compulsory racial segregation in public schools constitutional?" The justices' overarching objective in deciding the case was to achieve a unanimous front for the answer, "No." *Brown*'s constitutional reasoning, such as it was, means little to nothing because the justices didn't view the cogency or persuasiveness of the constitutional case as particularly important. Inducing acceptance of their "ipse dixit"[133] was the order of the day. The justices cared about outcome, unanimity, tone, and constitutional rationale——in that order.

[132] 551 U.S. 701 (2007).
[133] Kurland (1979a, 317).

Chapter 4. The Seven

The Court's first *Brown* conference on the merits, in December 1952, had ended in indecision. On the advance recommendation of Justice Jackson, the conference suspended its usual practice of taking a formal vote at the end of discussion in order to determine which side had a majority and to assign the opinion for that majority to a particular member. Despite this agreement to hold off on a formal vote, the tenor of the conversation revealed that the justices fell into three groups. Chief Justice Vinson and Justice Reed clearly indicated that they believed the rulings of the federal district courts upholding compulsory segregation in public education were correct. Justices Black, Douglas, Burton, and Minton unequivocally stated they were prepared to vote that day to declare almost all forms of such segregation unconstitutional. Justices Frankfurter, Jackson, and Clark each expressed ambivalence about the correct resolution of the cases. Thus, at the end of the first *Brown* conference in December 1952, the Court appeared to be divided 4-3-2.[134] It is impossible to know how Justices Frankfurter, Jackson, and Clark would have voted in *Brown* if required to in 1953, but the Court's resolution of a case touching upon related questions that spring suggests that if push came, Frankfurter and probably Jackson and Clark would have gone along with Black, Douglas, Burton, and Minton——although without a single opinion for the Court.

That case was *Terry v. Adams*,[135] colloquially known as the "Jaybird" primary case. The Jaybird Democratic Association held pre-primary elections for the Democratic Party in Fort Bend County, Texas, from which blacks were excluded from voting. Although the "Jaybirds" were tech-

[134] Klarman (2004, 298) agrees with this assessment.
[135] 345 U.S. 461 (1953).

nically a private organization, in his opinion for the Court Justice Black concluded that the organization's effective control over the Fort Bend County political process and its exclusion of blacks amounted to a circumvention of the Fifteenth Amendment.

> The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county. The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids -- strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.[136]

Terry v. Adams figures in the *Brown* story in part because it took up a disproportionate share of the justices' time in spring 1953,[137] preventing the justices from developing a consensus in *Brown* on the first hearing, and making a majority of the justices receptive to Frankfurter's "filibustering" device of ordering reargruments on the legislative history of the Fourteenth Amendment. *Terry* also matters because the justices' voting behavior in *Terry* presaged their voting behavior on the *Brown* merits after reargument. At the first *Terry* conference, five of the justices

[136] Id., at 469-470.
[137] Hutchinson (1980, 38).

voted to sustain the Jaybird primary. However, Frankfurter, who at the vote's conclusion apparently realized that his vote would be decisive in sustaining a practice that disenfranchised blacks, immediately switched his vote, making the tally 5-4 in favor of holding the Jaybird primary unconstitutional. According to Klarman,

> Vinson, Reed, Minton, and Jackson planned to dissent, and Jackson drafted an opinion that criticized the majority for sacrificing 'sound principle[s] of interpretation.' Yet when *Terry* came down, only Minton dissented. Apparently the other three prospective dissenters, once deprived of control over the outcome, were unwilling to subordinate their political preferences to their legal principles. Similar considerations may explain the unanimity in *Brown*.[138]

As we will see, the close division on the *Brown* merits that emerged among the justices at the 1952 conference gave way to unanimity by the late spring of 1954.

On May 27, 1953, with just two "decision" Mondays[139] left in the Court's 1952 term, Frankfurter circulated to the justices a reargument order that he had drafted with the help of his law clerk, Alexander Bickel. The order posed five questions to the parties on the legislative history of the Fourteenth Amendment and the powers of Congress and the Court to interpret it.[140] After several minor changes in the order's wording, five of the justices——Black, Frankfurter, Jackson, Minton, and Burton——voted to put *Brown* down for reargument.[141] The revised order was issued on June 8, the last decision Monday of the 1952 term.

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[138] Klarman (2004, 303).
[139] At the time, the Court announced decisions only on Mondays and concluded its term in early June. Fassett et al. (2012, 561); Schwartz (1983, 101).
[140] See fn 8, *supra*.
[141] William O. Douglas Papers, Box 1150, Library of Congress.

Chief Justice Fred Vinson, one of the probable votes to sustain segregation, passed away unexpectedly on September 8, 1953. By recess appointment, President Eisenhower named then-California Governor Earl Warren to head the Court on October 1, in time for Warren to participate in the entirety of the Court's 1953 term. The significance of this shift in personnel was not lost on the justices, and its import was acutely apparent from the very beginning of the second *Brown* conference on December 12, 1953. Proceeding by justice, not year or conference, what follows is an attempted reconstruction and detailed analysis, on the basis of the justices' conference notes that have survived to the present day, of the *Brown* conference discussions in both 1952 and 1953.[142] Two of the nine justices who joined the Court's unanimous decision on May 17, 1954 spoke at only one conference——Warren in 1953, after his appointment to replace the late Vinson, and Black in 1952, since he was away to attend to an illness in his family the year after.

WARREN

Speaking first at the second *Brown* conference in 1953, Warren began by repeating Justice Jackson's suggestion from the conference the year prior that no formal vote on the merits be taken, but that the justices' views on the merits "be discussed informally in view of their importance."[143] "Realizing that when a person once announces he has reached a conclusion it is more difficult for him to change his thinking,"[144] Warren later elaborated, "we decided not to make up our minds on that first conference day, but to talk it over, from week to week, dealing with different aspects of

[142] Not all of the primary source material survives. For example, Black burned his conference notes and tried to censor his remaining judicial papers after reading political scientist Sidney Ulmer's (1971) attempted reconstruction of the *Brown* conference discussions from the notes of the then-recently deceased Burton. Black felt that Ulmer, working from Burton's notes, had misconstrued Black's position at the first *Brown* conference (Kluger [1976] 2004, 597-598). This tale serves as a warning to less capable and intrepid scholars than the author of the present work.
[143] Hockett (2013, 71).
[144] Id., at 79.

it——in groups, over lunches, in conference. It was too important to hurry it."[145] Warren then commented upon the matter before the Court as follows: "separate but equal doctrine rests on basic premise that the Negro race is inferior -- that is the only way to sustain *Plessy*."[146] In other words, *Plessy* can be affirmed and segregation can be sustained only if the Court is willing to affirm white supremacy. "If we are to sustain seg[regation] we must do it on that basis."[147] Justice William O. Douglas records Warren as remarking that the "argument of the negro counsel proves that they are not inferior." For constitutional support, Warren claimed that "the 13th, 14th, and 15th Amendments were intended to make equal those who were once slaves -- that view causes trouble perhaps -- but CJ does not see how segregation can be justified in this day and age -- he recognizes that time element is important in the deep south -- we must act but we should do it in a tolerant way."[148] Schwartz contributes the following refinement of Warren's closing remark: "the Chief concluded his presentation, 'my instincts and feelings lead me to say that, in these cases, we should abolish the practice of segregation in the public schools - but in a tolerant way.'"[149] To summarize, the substance of Warren's statements is as follows.

1. *Plessy* is based on white supremacy, and defensible only on the basis of white supremacy.
2. The example of the black counsel who argued the *Brown* cases for the NAACP proves that white supremacy is false.
3. The framers of the Civil War Amendments intended those Amendments to secure equality for blacks.

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[145] Kluger ([1976] 2004, 686).
[146] William O. Douglas Papers, Box 1150, Library of Congress.
[147] Hockett (2013, 73).
[148] William O. Douglas Papers, Box 1150, Library of Congress.
[149] Schwartz (1983, 86-87).

4. Accordingly, segregation should be overturned.

This framing, though not singling out any particular persons from among the justices who might disagree with Warren, telegraphed a boldness belying its superficially modest and matter-of-fact tone. First, the unequivocal and impersonal manner in which Warren conveyed his views might have caused——and been intended to produce——a chilling effect on the expression of contrary opinions. The justices' conference notes do not record Warren qualifying these statements as his opinions ("it appears to me", "I think") or softening them with clauses suggesting probability ("it might be", "it is probable"); all available sources record him presenting his views as firm facts. It is a cast of speech that while not quite quelling dissenting views, tends not to invite any.

Second, in tying *Plessy* to white supremacy, Warren placed on any justice who wished to speak favorably of *Plessy* a burden to defend white supremacy, or, at a minimum, to prove the two were severable. As Schwartz observed of Warren's *Brown* conference delivery, "[b]y stating the matter in terms of the moral issue of racial inferiority, he placed those who might still lean toward Plessy on the defensive. Then he reached out to them by his stress on the need to proceed 'in a tolerant way.'"[150] While Warren's final comment may have been intended as an olive branch to dissenting justices, it did not ameliorate the boldness or certainty of Warren's contention that white supremacy and segregation were inextricably joined.

Third, in referencing the black NAACP counsel, Warren not only put a face on the victims of racial discrimination, but also suggested that these attorneys should be held in mind when pondering any argument advanced in support of *Plessy*. The probable intention and foreseeable effect of personifying the targets of racial discrimination was to induce sympathy for blacks as a class. Moreover, summoning the recent memory of the passionate and adept black attorneys who humbly

[150] Id., at 87-88.

requested a fair shake for themselves and their fellow African Americans at the bar of the Supreme Court was no doubt a persuasive evocation. Justices who might be inclined to speak in favor of *Plessy* were therefore put on notice by Warren's opening remarks that any argument advanced in favor of *Plessy* would likely come across, to the Chief Justice at least, as an implicit denigration of the capable black attorneys who argued *Brown* before the Court.

Fourth, Warren's casual and unequivocal claim that the Civil War Amendments were intended to "make equal those who were once slaves" evinces a failure to grapple deeply with the considerable evidence presented by Virginia, South Carolina, and Alexander Bickel's report on the history of the Fourteenth Amendment that cast doubt upon the proposition that the Amendments' "intention" to achieve equality "across the board" could be established to a high (or even middling) degree of probability. Rather, it seems Warren had almost categorically accepted the claims of the 1953 NAACP brief, which stated in part:

> … [T]he very purpose of the Thirteenth, Fourteenth, and Fifteenth Amendments was to effectuate a complete break with governmental action based on the established uses, customs and traditions of the slave era, to revolutionize the legal relationship between Negroes and whites, to destroy the inferior status of the Negro and to place him upon a plane of complete equality with the white man….[151]

However, as the Virginia and South Carolina briefs effusively demonstrated, whether the "purpose" referred to in the NAACP brief was that of the framers of those amendments or the legislators composing the ratifying state legislatures, virtually no evidence existed suggesting that any of those individuals desired or understood the Amendments to place blacks on a footing of "complete

[151] Id., at 649.

equality" with whites.[152] The point here is not to suggest Warren should have arbitrarily taken a different side in a debate between adversaries before the Court. Nor is it to say Warren would not have been justified in adopting several other of the persuasive historical and interpretative rationales advanced by the NAACP. The point is instead that even under the best circumstances for the NAACP, the true historical "score," as a majority of the justices[153] would go on at the conference to acknowledge explicitly, was almost even, rather than an unequivocal win for the NAACP, as Warren's view of the historical debate implied. Indeed, as will become clear in Chapter 7, in Jackson's judgment——which, given Jackson's evident lack of emotional investment in segregation, there is good reason to trust on the matter of truth-seeking on this question——the "score" actually *favored* the eventual losers in *Brown*.

As Kluger recounts, the NAACP strategy for the *Brown* rearguments had been to neutralize any historical theories that suggested the Fourteenth Amendment *could not* conceivably be read as a mandate of general equality in all facets of government action. The theory undergirding this strategy was that a finding of historical indeterminacy would liberate the justices to follow their sense of fairness. As Thurgood Marshall memorably——and accurately——predicted of the *Brown* battle of historical briefs: "A nothin'-to-nothin' score means we win the ball game."[154] That Warren was convinced by (or, more likely, adopted as a historical rationale for pursuing his underlying egalitarian commitments) the NAACP's weak historical argument regarding the Civil War Amendments, while remaining totally unreceptive to a mountain of contrary evidence, suggests confirmation bias (affirming only such evidence as is amenable to his preferred outcome) and

[152] Id., at 651.
[153] Reed, Douglas, Frankfurter, Jackson, and Clark.
[154] Kluger ([1976] 2004, 622).

motivated reasoning (discounting, and failing to address in any respect, all countervailing evidence) on Warren's part. This surmise is strongly reinforced by a comparison of Jackson's accounting and reception of the historical evidence to Warren's.[155]

Fifth, Warren's emphatic embrace of the NAACP's position instantly telegraphed to the justices that, provided the recent rehearings had not changed the minds of Black, Douglas, Burton, and Minton, there were now five votes——a majority of the Court——to hold segregation unconstitutional. This likely altered the dynamic of the resulting discussions considerably. The three fence-sitters from the 1952 arguments (Frankfurter, Jackson, and Clark) were now apprised of the overwhelming likelihood that, if they continued to hew to the scruples they had aired a year earlier about the judicial basis for overturning segregation, they would end up doing so in dissent. These justices would, in other words, be omitted from the Court majority's decision-making process in what every justice viewed as the most momentous case of the 1953 term, and what most justices suspected even at the time would turn out to be one of the most important set of cases to come before the Court during their tenures. Accordingly, or perhaps simply coincidentally, when it came time to speak, though the erstwhile fence-sitters all rehashed their concerns about the judicial case for ending segregation, each signaled far more jurisprudential flexibility than he had the year before.

Sixth, the behavior Warren displayed at the *Brown* conference and other justices' later descriptions of Warren's typical conference conduct and constitutional decision-making indicate

[155] See Chapter 7, *infra*.

that the Chief Justice was frequently motivated by moral intuitions, rather than legal considerations. As we saw above,[156] Warren referred explicitly to his "instincts and feelings" in announcing his position on the merits in *Brown*. If his statement is literal, it suggests that the social intuitionist model captures Warren's decision-making on the *Brown* merits. Moreover, Justice Byron White, who joined the Court in 1962, would later describe Warren's conference practices thus: "he would state his position and he usually had his mind made up. He usually had a pretty firm view of the case."[157] This observation implies that such reasons and evidence as the other justices presented in the conferences had little to no effect on Warren, indicating that he had "made up his mind" by means other than rational deduction or legal reasoning. White's evocative description of Warren's decision-making process is also consistent with this interpretation. Warren "was quite willing to listen to people at length," White related, "but, when he made up his mind, it was like the sun went down, and he was very firm, very firm about it."[158] Additionally, Justice Abe Fortas, appointed in 1965, would remark of the Chief Justice's conference leadership: "it was Warren's great gift that, in presenting the case and discussing the case, he proceeded immediately and very calmly and graciously, to the ultimate values involved——the ultimate constitutional values, the ultimate human values."[159] Schwartz observes that Warren's *Brown* conference presentation was an illustration of his characteristic pursuit of "ultimate human values" in deciding constitutional questions. Warren

[156] Discussion at fn 149, *supra*.
[157] Schwartz (1983, 145).
[158] Id., at 69.
[159] Id., at 87.

> clearly stated the question before the Court in terms of the moral issue of racial inferiority. Segregation, he told the Brethren, could be justified only by belief in the inherent inferiority of blacks and, if we follow *Plessy*, we have to do it upon that basis. Warren's words went straight to the ultimate human values involved. In the face of such an approach, traditional legal arguments seemed inappropriate, almost pettifoggery.[160]

To borrow Fortas' words once more, "opposition based on the hemstitching and embroidery of the law appeared petty in terms of Warren's basic values approach."[161] Pedantic, legalist "hemstitching and embroidery" are certainly not the tools upon which intuitive decision-makers rely.

Knowledge of Warren's "human values" approach increases the probability that Warren's determination that the Civil War Amendments were intended to make blacks and whites perfectly equal was a consequence of motivated reasoning; in other words, Warren's esteem for the "human value" of equality may have mediated his interpretation of the Amendments' legislative history. The "human values" approach also indicates that the truly dispositive consideration for Warren in determining segregation's constitutionality was his disgust with or indignation at assertions of black inferiority, and converse claims of "white supremacy," as the bases for segregation. But perhaps the greatest proof of the applicability of the SI model to Warren's behavior comes from comments Warren made to Kluger two decades after *Brown*. Warren conceded that desegregation had been, in his view, a foregone conclusion. "I don't remember having any great doubts about which way [the decision in *Brown*] should go," Warren remarked, pointing to the Court's erosion of *Plessy* as an authoritative interpretation of the Equal Protection Clause in the 15 years prior to *Brown*. "On the merits, the natural, the logical, and practically the only way the case could be

[160] Ibid.
[161] Ibid.

decided was clear. The question was *how* the decision was to be reached."[162] For Warren, as for many of the other justices, the salutary moral decision to end segregation preceded *how* that outcome would be justified in constitutional terms to the public and the American bar.

BLACK

At the 1952 conference, Black had been the first justice to speak in clear opposition to segregation. His remarks, as recorded by Justice Clark, appeared to be stream of conscience. He first distinguished the state cases from the federal one: "Not sure Congress is barred by same limitations as states." This remark suggests that Black thought that racial segregation violated equal protection and not necessarily due process, for the only formal restriction regarding individual rights that the federal Constitution imposes on the states and not on the national government is the equal protection guarantee of the Fourteenth Amendment. If Congress is not "barred by [the] same limitations as the states," the difference in restriction would necessarily arise from the unequally distributed equal protection burden of the Fourteenth Amendment. Black then wondered aloud whether "segregation [is] per se [a] violation?" A violation of which specific clause, Clark's notes do not specify; however, as noted above, we have good reason to believe Black was thinking of the equal protection. Black is recorded as then remarking, "to so hold would bring drastic things. S.C. [presumably, South Carolina] etc." This comment, of course, reflected Black's concern with probable southern noncompliance and perhaps even outright resistance to a desegregation ruling. The remark also foreshadowed Warren's peculiar choice of constitutional rationale in the eventual *Brown* opinion, which refrained from declaring segregation "per se" (intrinsically) unconstitutional. Continuing, Black stated that he "do[es]n't believe in injunctions," presumably indicating

[162] Kluger ([1976] 2004, 681-682).

that he was opposed to the judiciary becoming involved in the tedium of enforcement-by-decree. His next comment, however, is crucial: "at first blush I would have said it was up to Congress. But if we can declare confiscation or other laws unconstitutional than we can segregation." This remark is worth elaborating upon at some length.

"Confiscation" refers to the congressional policy, during and following the Civil War, of "sweeping confiscation programs designed to seize the private property of enemy citizens on a massive scale." This regime commenced with the passage of the Second Confiscation Act in July 1862 and "permitted the Union government to seize all the real and personal property of anyone taking up arms against the government, anyone aiding the rebellion directly, or anyone offering aid or comfort to the rebellion."[163] Though it would be another seven years before the federal judiciary began to apply the law, a year later, the Kentucky Court of Appeals ruled in *Norris v. Doniphan* that the statute effected an unconstitutional "derogation of the personal rights and rights of property." In so holding, the court observed that "[c]onfiscation had not been recognized by the law of nations since the eighteenth century, and since then 'nearly a century's advance of commerce, civilization, and Christianity' had rendered 'the barbarous rules of the past intolerable.'"[164]

The federal judiciary agreed. Beginning in the late 1860s, in a series of complex cases touching upon the property rights of former rebels whose estates had been subject to confiscation, the Court circumscribed the Act's constitutional basis and deliberately eroded the law's efficacy. *Bigelow v. Forrest*,[165] decided in 1869, announced the beginning of the end for confiscation. There, the Court incorporated into its construction of the Second Confiscation Act an "explanatory reso-

[163] Hamilton (2004, 254).
[164] Id., at 265.
[165] 76 U.S. 339 (1869).

lution" that President Lincoln, under threat of vetoing the entire bill, had managed to force Congress to adopt at the time of the bill's passage. Lincoln had been concerned that confiscation ran afoul of the constitutional prohibition that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted,"[166] by denying to a rebel's posterity the right to inherit his estate. Lincoln's "explanatory resolution" touted "temporary confiscation"[167]: the confiscation of the life estate of the rebel, with the fee remaining in the rebel's heirs. Though lower federal courts populated by Radical judges attempted to undo Lincoln's evisceration of the Act, in 1870 the Court converted Lincoln's limitation into constitutional law.

Thus, in *Bigelow*, the Court ruled that "the U.S. could seize property only for the 'life of the person for whose act it had been seized'": all sales of confiscated properties were only of "a life interest" in the confiscated estates that expired with the life of the rebel. "After *Bigelow*," Daniel Hamilton remarks, "permanent, uncompensated property confiscation for disloyalty was practically impossible and conceptually illegitimate."[168] However, controversies stemming from the market uncertainty created by *Bigelow* continued to percolate up to the Court through the turn of the century. The Court was under periodic pressure to clarify the contours and permissible logistics of temporary confiscation. Though *Bigelow* had introduced a rule intended to achieve justice and ensure conformity to the Constitution, it had also opened a Pandora's box of property litigation. The next term, in *Miller v. United States*,[169] the Court palliated some of those uncertainties and further eroded confiscation by pinning it squarely on Congress' Article I war power. Confiscation "was not upheld by the [Court] so much as subsumed within existing rights recognized

[166] Article III, §3, Clause 2.
[167] Hamilton (2004, 269-271).
[168] Hamilton (2004, 273).
[169] 78 U.S. 268 (1870).

by the laws of war. . . . The Court treated intensely controversial legislation as settled law, stripping away any larger implications for ideas of property." *Miller* circumscribed Confiscation to time of war, and established a constitutional foothold for restoring to erstwhile rebels some of their revoked property rights in time of peace.

Black's seemingly offhand remark about "confiscation" at the first *Brown* conference takes on new meaning when bathed in the light of the country's——and especially the Court's——experience with confiscation, which stretches back to the polity's founding. *Bigelow* was to Confiscation as *Brown* was to segregation. Like segregation, confiscation was underpinned by precedent——legislative tradition——and moral (or at least ideological) appeals. The first great American experiment with confiscation occurred during the Revolutionary War, when Loyalist "property had been permanently seized, as part of a republican vision of the overriding importance of allegiance to the polity."[170] "A great deal of Loyalist property was seized forever, without compensation or recourse to the courts."[171] In the eighteenth century, confiscation was therefore a legal tool used to punish disloyal members of the community for failing to support the nascent liberal republicanism of the victorious American rebels, whose military victory consecrated rebellion as Revolution and, a few years hence, Founding. Four generations later, confiscation was resurrected to punish rebels whose defeat condemned their appeal to Heaven as illegal rebellion. By this later date, the legal circumstances had changed: the Constitution, written and ratified after the first bout of confiscation, condemned its injustice. So as in *Brown* with segregation, in *Bigelow* the Court announced the end of confiscation, but would take close to three decades to sort out what that end would look like concretely.

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[170] Ibid.
[171] Id., at 254.

Thus, in surveying the landscape of judicial opportunity at the 1952 *Brown* conference, Justice Black was probably thinking of the Court's first real experience with superintending, over a period of decades, constitutional rights to overcome a specific legislative injustice. Black appeared confident that the parallels between confiscation and segregation boded well for the Court's likelihood of success if it intervened in the latter. Indeed, the Court would probably be on stronger footing in trying to end segregation, given that its primary target would be state legislation, a less formidable adversary than a national policy supported by an active congressional majority. Black's remark further hinted at the possibility that he was contemplating that a judicial ruling to end segregation would foment a long stream of litigation to adjudicate the logistics of enforcement, just as *Bigelow* did for ending Confiscation. Indeed, immediately prior to Black's reference to Confiscation, Clark records him as saying: "one of worse features is courts are put on battle front––—don't believe in injunctions——", lending credence to the notion that Black's thinking about Confiscation included a weighing of the problems of enforcement. Whatever the drawbacks of enforcement, however, Black appeared satisfied that the Constitution compelled desegregation. "I am compelled for myself to believe the idea of segregation is because negro is inferior. Nor can I escape that Amendments had as their basic purpose the abolition of such castes. That is what is behind opposition now."[172]

Clark records Black rephrasing the previous thought and adding an important qualification. "If I have to meet it, the purpose of the law is to discriminate on account of color——that the Amendments were designed to stop it——unless the long line of decisions banned this course——I don't think Congress went as far as they thought Amendments went——". To begin at the end,

[172] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, The University of Texas at Austin.

Black's comment about Congress is ambiguous, but the most plausible interpretation is that he believed Congress' statutory actions, e.g., in passing the Civil Rights Act of 1866 and segregating the D.C. public schools, were not exhaustive of Congress' understanding of the reach and effect of the Civil War Amendments, nor dispositive for determining the same over eighty years later. In other words, Black might say, the Fourteenth Amendment is not coextensive with the Civil Rights Act of 1866, though the former was adopted and ratified to remove any doubt about the constitutionality of the latter. Furthermore, that the same Congress that adopted the Fourteenth Amendment decided to segregate the D.C. schools does not prove that segregation is constitutional: though Congress meant to abolish castes, perhaps it did not understand that segregation in education was precisely the kind of legislation it wished ultimately to proscribe.

Whatever Black's meaning in pronouncing on Congress and the Amendments, in the words that Clark underlined, Black seemed to be grappling with *stare decisis*. After expressing his preferred outcome unequivocally and even repetitiously, he appeared to articulate the possibility that the weight of precedent might tip the balance of judicial factors toward affirming *Plessy*, though either his comment to that effect or Clark's recording of it is cryptic. That the words were underlined, however, suggests Black delivered them with emphasis, and emphasis implies they formed part of a coherent thought, pointing to the likelihood that Clark's diligence in recording comments slipped at this point in the conference. So the remarks leave the impression that Black was saying that segregation is unconstitutional, and that he would so vote unless he could be persuaded that the weight of precedent was so overwhelming as to make it imprudent to do so. Black concludes: "I have to vote that way——".[173]

Justice Black's train of thought can be summarized as follows.

[173] Ibid.

1. In permitting or enforcing segregation, Congress might be subject to a less exacting constitutional hurdle than the states because Congress is not formally subject to the Equal Protection Clause of the Fourteenth Amendment.
2. Therefore, equal protection is the likely ground for overturning segregation.
3. Does the Constitution outlaw segregation *per se*? To so hold would rouse resistance from certain states.
4. Congress' inaction invites the Court's intervention.
5. The Court's nineteenth century experience with confiscation is a precedent for intervening today to secure a constitutional right in a politically fraught area of law backed by the weight of history and tradition.
6. Segregation owes its existence to the belief that blacks are inferior. Segregation creates castes, and the purpose of the Civil War Amendments was to abolish such castes.
7. If, however, overturning segregation is "banned" by "a long line of decisions," Black might acquiesce in sustaining the practice.
8. The 39th Congress' statutory actions are not exhaustive of the Fourteenth Amendment's meaning.
9. The cumulative effect of the foregoing considerations makes Black feel compelled to vote to overturn segregation.

The movement of Black's comments begins with constitutional reasoning: what does the Constitution say, and to whom does it apply? In his musings about Congress, Black seemed to conclude that segregation runs more afoul of equal protection than due process. Without betraying evidence that he had yet decided on the merits, he next reflected on a rationale: does segregation itself violate

some part of the Constitution, presumably (given his emphasis on the difference between the constitutional restrictions on the state and federal governments) equal protection? Black immediately recognized that "to so hold would bring drastic things," such as the Deep South, e.g. "S.C.", South Carolina. He then delivered the first hint that he had already made up his mind on the merits by saying that because Congress had not acted, the Court should. None of steps 1-3 compel this conclusion, and Black did not divulge its putative basis until step 6. The justice next countenanced the challenge of enforcement: in pursuing a program of desegregation, the federal judiciary could count only on its own powers. This realization raised the specter of judicial incapacity and failure. Black quickly overcame this unattractive prospect, however, by recalling the Court's experience with confiscation. "[I]f we can declare confiscation or other laws unconstitutional than we can segregation." Then, as if this sudden conviction that the judiciary is capable of achieving the result he desired to reach liberated him to announce the outcome he favored, he did so. Next, he articulated a caveat: the Court should dismantle segregation unless the force of precedent was too strong. Finally, in reaching his proffered outcome, he reiterated the sense of compulsion to which he alluded earlier in his remarks: "I have to vote that way."

Much of Black's train of thought, in particular, steps 1, 2, 3, 6, and 8, exhibit evidence of straightforward reasoning, unmediated by intuition. In these instances, Black appears to be reflecting dispassionately and with calculative effort on constitutional principles or probable consequences of possible courses of action. However, steps 4, 5, and 7 appear to be better captured by the social intuitionist model.[174] After the cursory legalistic considerations expressed in steps 1 and

[174] The psychology by which the mind can process any normative premise, even if that premise is ensconced in non-moral conceptions, such as an institution's mission or role in the political system, can fall under the social intuitionist model, since the process by which the normative commitment exercises influence over reasoning is the same as

2, steps 3, 4 and 5 comprise a brainstorm on the possible impediments to desegregation. In steps 1 and 2, Black identified a prospective constitutional authority for deciding Brown without articulating a constitutional rationale under that authority. In step 3, the justice mixed his musing on the basis for a constitutional holding (does segregation inherently violate some clause of the Constitution?) with strategic calculations about enforcement: "to so hold would bring drastic things." Step 3, therefore, operated as a segue from reasoning about a constitutional basis for overturning segregation to countenancing strategic concerns about enforcement, which continued with step 4 (whether Congress should or will act instead) and 5 (judicial precedent for taking such action).

The implications of these first five steps are as follows. First, Black had already made up his mind prior to steps 1 and 2 that segregation was unconstitutional, for the questions he implicitly posed presuppose the normative premise that segregation should be overruled. To ask, "how can the Court rid D.C. of segregation when Congress is not subject formally to the equal protection clause of the Fourteenth Amendment?" and, "should the Court say segregation is inherently unconstitutional and directly overrule *Plessy*'s rule of 'separate but equal'?" is to have already answered in the affirmative the more primordial inquiry of whether segregation should go: these are questions about means, not ends. Second, the palpable uncertainty that Black telegraphed about a constitutional rationale for stamping out Congress' policy of segregation in D.C. suggests that it was not a constitutional argument that ultimately convinced him that segregation in D.C. was unconstitutional. Rather, Black's uncertainty at the 1952 conference indicates that he harbored a motivation to develop a rationale that would support his conclusion, but had not yet succeeded in doing so. The internal struggle signaled by the justice's uncertainty probably arose from a clash

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that by which an explicitly moral principle or consideration does: as an explanation for (and perhaps as ex ante evidence for the existence of) an underlying sentiment cascading to a particular judgment. Reasons are then sought and usually discovered to rationalize this outcome (e.g., our institutional mission compels it).

between Black's desire to achieve uniform outcomes on the state and federal segregation questions and the obstacles imposed by his judicial philosophy.

With respect to using the Due Process Clause of the Fifth Amendment as a basis for overturning segregation sanctioned by Congress, Black's hands were probably tied by his famous antipathy toward substantive due process. Hutchinson speculates, for example, that Black's well-known distaste for the fundamental liberty doctrine and for the "due process philosophy" of such cases as *Meyer v. Nebraska*,[175] *Bartels v. Iowa*,[176] *Pierce v. Society of Sisters*,[177] and *Farrington v. Tokushige*[178] may have had a decisive impact on Warren's writing of the *Bolling* opinion for the Court. Warren produced two drafts of the *Bolling* opinion, relying in the first upon a "fundamental liberty" rationale that cited those cases as precedent, though in the second omitting supplanting the liberty account with the now-famous "reverse incorporation" theory.[179] Though the evidence is circumstantial, Hutchinson conjectures that either Frankfurter or Black convinced Warren to take a different approach. Douglas, for what his assessment is worth, believed Black was probably responsible.[180] In any case, sixteen months before Warren would commence the opinion-writing process in *Brown*, Black was already expressing ambivalence about the rationale for demolishing segregation commanded by the federal government. Over a decade hence, while dissenting in *Griswold v. Connecticut,*[181] Black would distinguish what he defended as the valid due process theory

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[175] 262 U.S. 390 (1923) (overturning on Fourteenth Amendment due process grounds a state law proscribing German language instruction in public and private schools).
[176] 262 U.S. 404 (1923) (effectively a companion case to *Meyer*, decided the same term and "upon authority of *Meyer*").
[177] 268 U.S. 512 (1925) (invalidating on Fourteenth Amendment due process grounds a state law prohibiting primary and secondary school aged students from attending private in lieu of public schools).
[178] 273 U.S. 284 (1927) (invalidating on Fifth and Fourteenth Amendment due process grounds a statute of the then-Territory of Hawaii requiring a permit to teach foreign language instruction in public schools).
[179] Hutchinson (1980, 45-48).
[180] Id., at 48.
[181] 381 U.S. 479 (1965).

upon which *Bolling* relied from that the *Griswold* majority advanced: "*Bolling v. Sharpe* merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law."[182] But Black had available neither this rationalization, nor *Bolling*'s eventual "it would be unthinkable"[183] theory of reverse incorporation, when he spoke at the December 1952 *Brown* conference.

There are good reasons, moreover, to believe that Black was foregoing his normal constitutional approach, and was therefore not engaged in constitutional reasoning, but instrumental calculations with a pre-determined outcome in mind, in delivering his comments about the Constitution's limits on the power of Congress to impose caste legislation. Black's literal or absolutist approach to reading the Constitution posited that legislative judgments can and should be voided only when the plain or literal text of the Constitution clearly condemned them, and when there was no text to the contrary, legislative judgments should be tolerated, even when they were unwise. Black's dissent in *Griswold*, in which he argued that the Fourteenth Amendment protected from state encroachment only those rights explicitly ennumerated in the Bill of Rights (necessarily excluding, of course, those of the Ninth Amendment), is a representative illustration of Black's textualism. There, Black stated:

> I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation

[182] Id., at 487, fn 1.
[183] 347 U.S. 497, at 500.

> is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination——a power which was specifically denied to federal courts by the convention that framed the Constitution.[184]

The appropriate method for altering the Constitution "to keep [it] in tune with the times," Black later declares, is not judicial review but the Article V Amendment process. "That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me."[185]

These dicta illuminate Black's remarks at the December 1952 *Brown* conference. The last of these pronouncements explains Black's emphatic position that the Fourteenth Amendment outlawed segregation: he not only had textual evidence in the Amendment to invalidate segregation, but also believed the intent of the Amendment's framers was to abolish caste legislation, whether or not they understood that segregation in particular belonged to that category of laws. The framers of the Fourteenth Amendment, in other words, had changed the Constitution to keep it in tune with the Union's victory in the Civil War——and to make constitutionally explicit a certain commitment that had long been foundational in the American regime, but had not been constitutionally opera-

[184] 381 U.S. 479, at 513.
[185] Id., at 522.

tionalized: legal equality. That, for Black, was dispositive for the unconstitutionality of state segregation laws. The former dictum, meanwhile, helps to account for Black's anxiety about the Constitution's limits on Congress: his comments suggest he felt to some degree genuinely restrained by the lack of a clear textual warrant or evidence of historical purpose in the constitutional restrictions on the federal government, all of which predate the Civil War. But, as Chief Justice Warren went on to note in *Bolling*, perhaps at Black's behest, and perhaps precisely *because of* the associate justice's disquiet in the face of this constitutional conundrum that his usual interpretative approach could not resolve, "it would be unthinkable," absurd, and, most importantly, bad judicial politics to eliminate segregation in a region of the country where resistance would be maximal, and not to do so where it would be minimal.

Whatever Black's motive, his remarks prior to step 6 indicate that he lacked a constitutional rationale for overturning segregation in D.C., and that he possessed a motivation or desire to do so. The closest he came to providing a constitutional case for invalidating segregation imposed by Congress is by pointing to the precedent of confiscation, which, it turns out, is a revealing selection: though Black phrased the point as one of capacity ("if we can declare confiscation or other laws unconstitutional, then we can segregation"), the thought itself seemed to assuage his qualms about the lack of a constitutional theory to buttress invalidating segregation. Black's next move coheres with this interpretation, for immediately after referencing confiscation, Black proceeded seamlessly to step 6, his constitutional argument for overturning segregation imposed by the state governments. It was as though Black felt the question of the constitutionality of congressionally-sanctioned segregation had been disposed of by his discussion of confiscation. This behavior is consistent with Haidt's layman conceptualization of motivated reasoning, discussed above: if the motivated reasoner wants to believe something, he asks himself, "*Can* I believe it?" If he doesn't

want to believe something, he asks, "*Must* I believe it?"[186] Apparently prevented by his judicial philosophy from answering in the affirmative to the first form of the "Can I?" question (i.e., "Can I believe the Constitution imposes restrictions on Congress that would allow us to overturn segregation?"), Black appeared unconsciously to reformulate the question to a lower threshold of difficulty: "Can we convincingly hold that the Constitution imposes the same restrictions on Congress as it does on the States?" Consistent with Haidt's predictions, Black seemed to locate one piece of evidence (confiscation) that allowed him to reach the answer he sought, an answer that released him from the cognitive dissonance of being stuck with an undesirable conclusion. As Haidt says, "you only need one key to unlock the handcuffs of *must*."[187]

An obvious objection to this interpretation of Black's conference remarks is that the decision-making Black evinced was not moral or psychological in nature but simply doctrinal: he sought unity and coherence for the constitutional standards controlling all levels of government. I do not dispute that Black's comments about the applicability of the Civil War Amendments to segregation legislation (in particular steps 6 through 9) are consistent with a legal model of judicial decision-making, which corresponds to the rationalist model of moral decision-making. In these later considerations, Black appeared to be operating almost entirely deductively and dispassionately. Indeed, he even countenanced sustaining segregation if the precedential weight behind it is too great to be overturned (step 7). But, Black's conclusion about the consequences of the Fourteenth Amendment for state-sponsored segregation, and his apparent overriding commitment to constitutional coherence, induced a motivation that permitted him to bypass, perhaps unwittingly,

[186] See fn 110, *supra*.
[187] Ibid.

his usual interpretative approach. In this limited but, I believe, important respect, the record of Black's decision-making at the first *Brown* conference adheres to the social intuitionist model.

Hockett discounts attitudinal accounts of Black's vote on the basis of Black's "racist background" and membership in the Ku Klux Klan. He instead argues that Black's behavior can be better accounted for by the "constitutive model" of judicial decision-making.[188] A "constitutive understanding of institutions" holds, against crassly attitudinal models of judicial behavior, that judges "'associate certain actions with certain situations by rules of appropriateness. What is appropriate for a particular person in a particular situation is defined by the political and social system and transmitted through socialization.' While 'self-interest undoubtedly permeates politics, action is often based more on discovering the normatively appropriate behavior'" than on other processes, e.g., balancing likely risk and reward, or consulting the judge's personal policy preferences or moral values. "'As a result, political behavior … can be described in terms of duties, obligations, roles, and rules.'" The judiciary's role in the broader American regime might be articulated as "mission" or "an identifiable purpose or shared normative goal that, at a particular historical moment in a particular context, becomes routinized within an identifiable corporate form as a result of the efforts of certain groups of people." Justices "discover that normatively appropriate behavior requires that decisions regarding constitutional rights . . . be informed by polity principles, that is, a developed theory of democratic governance, which implies a particular 'attitude——critical or trusting——toward legislative and interest group politics.'"[189] In other words, Hockett distinguishes constitutive concerns from attitudinal motives, and argues that much of the observed behavior that

[188] Hockett (2013, 115-121).
[189] Id., at 93-94.

I contend is subsumed under the social intuitionist model is in fact a manifestation of the influence of constitutive concerns.

Hockett's elaboration of the "constitutive model" and its applicability to Black prefaces Hockett's contention that in *Brown*, the NAACP succeeded in persuading the justices that "segregation laws were an integral part of a long-standing effort in the South to subjugate African Americans," thereby "invit[ing] the justices to regard American racial politics as hierarchical, albeit, amenable to——and in need of——judicial redress."[190] But Black's December 1952 conference remarks——indeed, the only ones he made at either of the *Brown* conferences, since he missed the 1953 conference due to an illness in his family——offer scant evidence for Hockett's claim. The evidence much more strongly supports the proposition that Black's particular judicial philosophy compelled him to accept the NAACP's gloss on the purpose of the Civil War Amendments. While Black stated his belief that segregation was predicated upon the idea of "negro [] inferior[ity]," he did not speak of any special judicial mission or duty to correct this fallacious notion, or legislation based on it. In keeping with his judicial temperament and philosophy, Black instead addressed himself to the purpose and text of the Civil War Amendments. His obviously motivated thoughts on Congress were, of course, the exception here. But the latter stages of his remarks suggest that, at the very minimum, Black adhered to his famous interpretative approach, and that, more likely than not, his judicial philosophy was cause of rather than cover for the outcome he espoused.

While I disagree with Hockett that attitudinalism cannot account for much, if not most, of the justices' behavior in *Brown*, I agree with him that it is likely that some of the justices' attitudes derive from "constitutive understanding of institutions" that Hockett raises. Indeed, a process of

[190] Id., at 97.

socialization with and among the other justices (not to mention the justices' elite D.C. social milieu) invariably conditioned them to be more responsive to certain legal, constitutional, and moral appeals, and less responsive to others. The NAACP's convincing presentation of historical data linking laws requiring segregation to Southern whites' efforts to preserve social inequality between the races and soaring pronouncements on blacks' aspirations to "join" fully the mainstream and middle classes of American society no doubt elicited a number of powerful intuitions in the justices' minds that segregation was offensive, unjust, and wrongheaded. But my argument is that for many of the justices, these epiphanies came first, and the inference (or rationalization) that the injustice or moral offensiveness of segregation means government was without legislative authority to impose it, came second. There is no evidence from the 1952 *Brown* conference that this was the case for Black on segregation's constitutional merits, but there is plenty of evidence the many of the justices experienced that process at the conferences.

Finally, an advantage of the social intuitionist model is that it can provide a theory of causality by which the constitutive commitments Hockett attributes to a sense of mission or duty affect a judge's decision-making. As Joshua Greene and colleagues have shown,[191] deontological moral decision-making is driven primarily by emotional responses; therefore, deontological "reasoning" is subsumed by the social intuitionist model. Hockett's constitutive and institutional principles tend to be deontological, though they can be given utilitarian justifications. To the extent such principles rely upon deontological argumentation, however, they conform to the social intuitionist model. If a judge accepts constitutive or institutional principle X as controlling under certain conditions, unless he has done so unwillingly or begrudgingly (as sometimes inferior court judges must and do), it is likely that he has invested himself emotionally in securing that principle——

[191] Greene et al. (2001); Greene et al. (2004).

even if only to a very small degree. Thus, the inculcation of institutional norms, even utilitarian ones, possesses an affective component. As an example, if principle X is——a la John Hart Ely[192] or, for that matter, Earl Warren——a judicial responsibility to lubricate the machinery of democracy, and keep clear access to its electoral channels, when the judge acts to secure that principle, the cause of his doing so is the sentiment or intuition of the justice and appropriateness of the principle to a particular application. No aspect of rational *deduction* permits the judge to pick that principle among competing alternatives. Rational deduction might help the judge determine when and how to apply the principle, but not to *choose* the principle. Socialization, legal education, life and career experiences, or membership within a political or ideological faction are the sources of such commitments. But at bottom, even self-contained, coherent systems of judicial ideology, e.g., Black's "textualist" interpretative approach, are systems of rules reversed engineered based on their capacity to produce outcomes, from the perspective of the user, that on average achieve a higher degree of satisfaction than do those of any other available "philosophy."

REED

At the 1952 conference, Justice Reed had spoken third after Chief Justice Vinson and Justice Black. Following such an emphatic statement of anti-segregationist views, Reed, who believed segregation to be constitutional, was put immediately on the defensive. Clark records the first words out of Reed's mouth as, "I approach from a different view."[193] The thrust of the remarks that follow is that state-mandated segregation meets rational basis scrutiny. "Negroes have not been assimilated. There has been some amalgamation of the races as shown by the counsel who

[192] Ely (1980).
[193] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

appeared here. There is a reasonable body of opinion that segregation is beneficial to both." Clark then records Reed as saying that there had been improvement for blacks in recent years: "Think of advancement: – transportation, voting – FEPC [Fair Employment Practice Committee][194] etc." Reed appeared to suggest both that preserving racial distinctiveness is a legitimate government purpose, and that, against the preceding suggestion of Justice Black, segregation was not rooted in some kind of white supremacist ideology: after all, Reed implied, segregation was coeval with recent "advancement[s]" that had benefited blacks. Presumably, Reed argued, a government policy promoting racial "integrity" through separation could coexist benignly with government policies improving the lot of blacks. That this is the implication of Reed's opening remarks is reinforced by the focus of his subsequent comments on whether *Plessy*'s command of separate but equal had been fulfilled in practice.

"We don't have same problems as South (in Ky.) Facilities not equal in Ky but better than they are in South," Reed stated. Reed's next remark, while more ambiguous, nonetheless appears to evince a preference for deferring to the legislative powers on the question of what for Reed seemed to be an area of social policy: "If legislature is to pass on questions then that is place for it to be done." Turning to the constitutional rationale for sustaining or upending segregation, Reed contended, "Constitution not fixed." The implication, then, is that Reed was purporting to eschew arguments rooted in history or precedent for sustaining segregation: he believed that *Plessy* was good law, not simply an unfortunate precedent that, for prudential reasons, must nonetheless be endured. Reed next applied *Plessy* to the facts of *Brown* and other state cases. The Court "[s]hould

[194] Created by President Roosevelt in 1941 to enforce Executive Order 8802, which banned racial discrimination in the employment practices of federal agencies and government defense contractors. https://www.ourdocuments.gov/doc.php?flash=true&doc=72. Accessed on July 5, 2017.

allow time for equalizing the opportunity, the facilities – may be take 10 years to accomplish in Va," he states. "I would uphold separate & equal."[195]

Reed's train of thought, slightly elaborated, is as follows.

1. Although some racial amalgamation has taken place, blacks and whites have not mixed extensively.
2. That they have not done so suggests perhaps it is better that they not.
3. That at least some "reasonable people" of good will approve of segregation suggests that it is benign and legitimate.
4. Segregation's benign character is demonstrated by the fact that it has endured at the same time as efforts have been made to help blacks.
5. There is regional variation in the extent to which *Plessy*'s command of separate but equal has been fulfilled in practice. In the border states (e.g., Reed's home state of Kentucky), the facilities to which blacks have access under segregation are superior to their equivalents in the Deep South.
6. If the legislatures (presumably, both state and federal) wish to increase the degree of facility equalization, or to create a more egalitarian rule than *Plessy*'s to superintend or even eliminate segregation, they may do so, but the Court should not require them to.
7. Both the existence and degree of segregation are properly objects of legislative discretion.
8. The practical requirements of the Constitution indeed change over time. But they have not changed so far as to obliterate *Plessy*'s basic correctness.

[195] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

9. The Court should affirm *Plessy* and require greater compliance with the "equal" half of its command, although afford the states time for the equalization to occur——up to a decade or more in some parts of the South.

An unstated presumption underlies Reed's remarks: forced separation of the races is compatible with equal treatment for both. Reed seemed to reach this conclusion due to intuitions induced by observations such as those presented in steps 1, 3, and 4, which suggest that Reed did not detect animus, or the imputation of the inferiority of blacks, in segregation. Step 1 indicates that Reed viewed widespread integration as difficult or impossible, if not dangerous. So, the justice seemed to be saying, regardless of normative considerations, the "natural" or inevitable tendency for whites, at least, was to wish to live separately from blacks. Steps 3 and 4 appear to be Reed's way of claiming that segregation was not motivated by racial malice, as the NAACP had argued during the hearings: how could racial animus have undergirded segregation when the latter coexisted with efforts to help blacks? The justice therefore seemed to conclude that segregation was a legitimate democratic manifestation of a racial majority's desire to live separately from a racial minority, and perhaps even of the majority's desire to maintain its racial distinctiveness or "purity." Reed appeared to feel that it was "beneficial to both" races that such distinctiveness remain, though he attributed this view to an impersonal "reasonable body of opinion" and declined or failed to produce any supporting argument. Instead, the only evidence he presented for this view came in step 1, which highlighted the difficulties of "assimilation."

Reed's comments at the 1952 hearings are remarkable for the degree of the virtually unmediated intuitive decision-making they telegraph. Speaking after Black, Reed was immediately on the defensive, and his comments appear directed toward rebutting Black's claim of personal knowledge that segregation was predicated on the inferiority of blacks. For this reason, it seems,

Reed argued that separation is an accommodation of difference, not an imputation of inferiority to one race by another, and adduced evidence for that proposition first by way of a naked appeal to ethos, to the authority of a "body of reasonable opinion," and second by pointing to contemporary developments that he interpreted as proving segregation and helping blacks are not mutually exclusive. Reed, in other words, seemed to harbor only benign or neutral feelings toward segregation, and bristled at the implication that those, who, like him, saw it as basically beneficial and reasonable, might be motivated by racial hatred.

Reed then spoke to his own personal experience as a citizen of a border state, perhaps to offer a counterweight to and partial refutation of the authoritativeness of the revelations of Justice Black, one of the Court's three (including Reed) members from a border or southern state. By highlighting Kentucky's more egalitarian segregation regime, Reed implied that *Plessy* can be just, if implemented correctly: that is, with a bona fide intent to provide equal facilities. Finally, Reed's pronouncement about allowing states many more years to comply with *Plessy* reinforce this construction of his preceding remarks. In sum, Reed's comments possess a distinctively apologetic, rationalizing cast: he sought to defend a practice that apparently never inconvenienced him or offended his sensibilities and in which he detected from personal experience not racial animus but a pragmatic accommodation of the reality of racial differences and, as he implied, the apparently "natural" and healthy desire of members of both races to preserve that distinctiveness. Because of Reed's evidently positive history with segregation, it seems that he remained thoroughly impervious to the NAACP's argument that the practice had originated in racist southern whites' desire to confine blacks to second class citizenship. An experientially-mediated emotional profile susceptible of producing the kind of intuitions that could have induced Reed to reach contrary conclusions, it would appear, was simply lacking in the justice's mind.

Reed's comments can therefore be characterized by hypothesis 1, intuition as causative of reasoning. The examples Reed picked to defend segregation imply that Reed saw himself as a reasonable person of good faith, and moreover had interpreted the NAACP's arguments and some of Black's remarks as imputing the opposite qualities to individuals who took a different view of the constitutionality, justice, or wisdom of segregation. It is impossible from the conference notes to know what, if any, emotions Reed experienced as he delivered his remarks, but it would be very difficult to square such remarks with a totally dispassionate, calm delivery. The justice's statements suggest that some indignation and spiritedness were likely. Reed's comments also indicate that he had engaged in some degree of confirmation bias as he processed the claims of the litigants. Perhaps in part because Justice Black had failed to advance any impersonal evidence for his allegation, based on personal familiarity with the South and its practices, that segregation was rooted in white supremacy,[196] Reed declined or failed entirely in his remarks to engage with that claim at any higher level than that of subjective experience or authority. In other words, it seems as though Reed felt a sufficient rebuttal to Black's soliloquy about Black's personal experience with segregation was a series of countervailing remarks of the same subjective nature and, therefore, persuasiveness and authority. Nonetheless, at no point did Reed broach and attempt to dismantle any of the NAACP's theories or evidence, if only to increase the chance that the other justices would join his views, suggesting that he never fully engaged with the NAACP's arguments.

At the 1953 conference, Reed spoke second, not third, due to Justice Black's absence. Still, as in the conference the year before, Reed had to follow the powerful expression of anti-segregation views by another justice (in this instance, Warren). This time around, Reed presented his views

[196] As Kluger ([1976] 2004, 596) notes, Black explicitly disclaimed any need for outside information to arrive at that conclusion.

somewhat more forcefully and clearly than in '52. The justice first stated that he had been persuaded on reargument that the history of the Civil War Amendments showed that "it was valid to have separate school leg[islation]."[197] Though this fact was not alone dispositive of the outcome of the cases, Reed conceded, it certainly undermined the position of those on the Court who cited the Amendments as unequivocal authority for overturning *Plessy*. Then, Reed resurrected his efforts from a year earlier to defend segregation's moral basis by restating his conviction that segregation was rational and not necessarily motivated by racial animus: "segregation is not done on [the basis of a belief in racial] inferiority but on [the basis of] racial differences." The justice then rebutted explicitly what in '52 he appeared, in Clark's notes, to address only implicitly: the insinuation that segregation is rooted in white supremacy. "There is no 'inferior race,'" Reed proclaimed. But segregation "protects people against mixing of the races." Segregation is not only supported by the weight of history and precedent; it is supported by justice. Accordingly, Reed remarked, were he "writing on a clean slate [he] probably would say should have seg[regation]."[198]

DOUGLAS

Douglas spoke after Frankfurter at both the 1952 and 1953 *Brown* conferences. Consistent with the reputation of his judicial opinions, his remarks at both conferences were succinct and unequivocal. "Cases very simple for me," Douglas began at the 1952 conference. "I can't avoid conclusion Hugo has reached in states cases – same in D.C." Kluger reports that Burton's notes record Douglas as remarking, "*State* can't classify by color for education,"[199] although Clark's notes do not record any rationale. In response to Frankfurter's exhortation at the 1952 conference

[197] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.
[198] Hockett (2013, 75).
[199] Kluger ([1976] 2004, 605-606).

that the Court reschedule the cases for another round of arguments in the October 1953 term, Douglas stated that he "would not mind setting down DC cases – but not others." To what this insistence on deciding the state cases quickly can be attributed is impossible to know. Perhaps Douglas shared Black's ambivalence about an adequate justification for invalidating an act of Congress on equal protection grounds, and would have liked to plumb the NAACP for more convincing rationales to enable the Court to do so. Or perhaps Douglas felt the rationale in the D.C. case was relatively unimportant, but was willing to acquiesce to the delay in the federal case as the price of securing a quick reversal of the state cases. On this latter view, Douglas might have felt that from the standpoint of judicial policy, the state cases were more important than the DC case. Whatever his motive, Douglas exhibited in the first *Brown* conference his characteristic approach to judicial decision-making, which privileged result over rationale.

Douglas's remarks at the 1953 conference were almost identical. He began by conveying to the conference the vote of the absent Justice Black, whose position had not wavered from the previous year. Then, speaking for himself, Douglas conceded that the reargruments had demonstrated that the "history" of the Fourteenth Amendment had "mixed light in it." This did not change the fact, however, that for him the constitutionality of segregation remained "a simple problem." Repeating his rationale from the year before, Douglas declared: "Race and color cannot be a constitutional standard for segregating the schools." Thus, Douglas announced, he "would join Warren's [position] and reasons."[200]

Perhaps the most telling characteristic of Douglas' remarks at the *Brown* conferences is his decision in both soliloquys to indicate agreement with another justice (1) on the constitutional outcome and (2) *for the reasons* the other justice gave. These declarations, in my view, constitute

[200] Hockett (2013, at 74.)

the only effort he made to justify his preferred outcome to the other justices, for he did not build any arguments of his own. The closest he came to doing so were the two occasions on which he presented a deontological anti-classification claim: in 1952, "*State* can't classify by color for education," and in 1953, "Race and color cannot be a constitutional standard for segregating the schools." Nevertheless, in syllogistic terms, these statements are conclusions; the major and minor premises that would compel them are missing. Thus, Douglas' claim that racial classification is unconstitutional went totally unsupported by any justifications other than those he adduced explicitly: Black's "reasons" in the '52 conference and Warren's in the '53 conference. Now, Black's and Warren's accounts are basically compatible: both Black and Warren respectively contended that the cause of segregation, or its only basis, was a belief in black inferiority. And both justices agreed that the purpose of the Civil War Amendments was to outlaw caste legislation. But there is a basic incongruity between these rationales and the deontological conclusion Douglas proffered at the *Brown* conferences.

The notion that government should not classify on the basis of color usually proceeds as a consequence from premises about the relationship of race to legitimate government purposes or objectives. The classical anti-classification argument proceeds along the following lines:

P1. Justice requires treating each person according to his merit.

P2. A person's character and actions determine his merit.

P3. A person's character and actions are unrelated to or independent of race or color.

C1. To treat people differently on the basis of race is to treat people independently of their merit.

C2. But to treat individuals independently of their merit is unjust.

P4. The reason for which legislatures classify by race is to treat people differently on the basis of race.

C3. To classify on the basis of race is unjust.

Other versions of the syllogism might substitute "fairness" for "justice," or impute an intrinsic harm (e.g., stigma) to racial classifications or to their use, rather than alleging that such classifications are inherently unjust or unfair. But, the above syllogism is representative of the form anti-classification reasoning takes.

Now, of the premises, the third is the one on which segregationists and integrationists most disagreed: indeed, negation of premise 3 is the necessary but perhaps not sufficient condition of asserting "white supremacy." And it is precisely as an attack on the denial of this premise that Warren's comments about the NAACP counsel seem to be intended. But in conference, neither Warren, Black, nor Douglas clearly stated this crucial premise or presented the argument of which it is the central element in anything close to the argument's entirety. Warren unflinchingly endorsed the third premise by adducing evidence for it in the example of the NAACP's black counsel, and by highlighting the offensiveness of the alternative conclusion (in effect, that a denial of the third premise requires an endorsement of white supremacy) to which he contended probity requires assent if premise 3 is negated. But he failed or declined to articulate the premise or couch it in the broader argument that racial classifications are invidious. Instead, the Chief Justice emphasized that segregation was unjust because it was unfair to blacks and, for good measure, added that it was unconstitutional because banned by the Civil War Amendments. Black, in turn, hewed fairly closely to his usual interpretative approach, at least with regard to the states, and did not address himself at all to the above syllogism, thereby bracketing the question of segregation's morality, at

least ostensibly. Douglas, finally, presented only conclusion 3, although he cast it in at least superficially constitutional ("*State* can't"), not moral ("it is unjust," "it is intolerable," "it is wrong"), terms. However, in the '52 conference, Douglas seemed totally untroubled by Black's qualm that the Constitution may not exert any equal protection constraints on Congress. That Douglas was willing to gloss over that important constitutional detail ("I can't avoid conclusion Hugo has reached in state cases – same in D.C.") without providing any distinguishing rationale for his conclusion——if only to resolve and assuage Black's conundrum——implies that Douglas was more concerned that the cases be decided in a particular direction than that that outcome be reasoned perspicaciously. So too does Douglas' treatment of Black's argument concerning state segregation as basically dispositive of both kinds of legislative action, when, of course, Black himself was still suffering grievous doubts about the constitutional basis for overturning segregation in D.C.

Reaching the outcome Douglas supported in conference through *reasoning* alone would have required much more detailed analysis, such as that demonstrated in the anti-classification syllogism, than the kind Douglas evidenced in his conference remarks, or Black and Warren exhibited in theirs. Now, it is certainly possible that Douglas had privately reasoned his way to the outcome he unhesitatingly announced in conference, or that he had been, for example, completely persuaded by the NAACP briefs, the 1952 iterations of which strongly emphasized anti-classification claims. However, whether or not reasoning or reasoned persuasion conduced Douglas to the outcome he defended to his colleagues, there are two reasons to conclude that the social intuitionist model captures elements of his conference remarks, if not his conclusion as to the cases' result. First is the fact that his anti-classification conclusion is not compelled by the reasoning presented in conference: neither Black's, Warren's, nor Douglas' remarks provide an adequate basis for reaching conclusion 3. Second is Douglas' concession at the '53 conference that the Fourteenth

Amendment has "mixed light in it." This comprises an acknowledgment that the "purpose" of the Amendment or the "intent" of its framers was not incontrovertibly to outlaw segregation. Probity, it would seem, induced Douglas to go at least this far. However, what followed this concession was not an adjustment, but a forceful reiteration, of the justice's original position. This reaffirmation exhibits the markings of motivated reasoning: when confronted with information that is not easily reconciled with their preferences, people tend to discount that information, sometimes even reacting defensively to the resulting cognitive dissonance by "doubling down" on their initial opinions. At the very least, had Douglas reasoned his way to the conclusion that the newly-discovered "mixed light" did not require him to alter his position, we would expect him to give some indication of why not, but the justice evidently felt no compulsion to justify his steadfastness. While there is no dispositive proof one way or the other, these considerations are consistent with the proposition that Douglas adopted a deontological, anti-classification constitutional rationale (quite possibly cribbed directly from the 1952 NAACP briefs) after he had already reached a decision on the outcome (to end segregation), and then, convinced of the justice of that outcome, effortlessly overcame constitutional qualms such as Black's concern that equal protection might not constrain the federal government, and the contention of the state governments at the 1953 rearguments that the Civil War Amendments may not have had the purpose or intent ascribed to them by the NAACP.

This interpretation, furthermore, coheres with what is known about Douglas' personality, temperament, and judicial approach, such as it was. Assessing the first decade of Douglas' tenure on the Court, the justice's biographer Bruce Allen Murphy remarked,

> In anticipation of the day when he would leave the Court, Douglas showed little interest in learning the craft of a career jurist. He had no interest in developing a long-term jurisprudential philosophy. Instead, he behaved in each case just like he had as a commissioner on the SEC: determining which issues were in his own best interests, battling with his enemies, and taking positions with an eye to his political future.[201]

Moreover, Douglas developed a reputation, especially later in his career, for writing hurried and underdeveloped judicial opinions that were heavy on philosophy but light on the traditional trappings of constitutional reasoning. After his close miss with the vice-presidency and then presidency in 1944 and 1945, Douglas was worse for the wear. The justice's longtime personal attorney and close friend, Clark Clifford, later recounted of Douglas' frustrated presidential hopes, "It certainly would take a lot of luster out of your life, I would think …. When a man knows that—–that he was that close to the top—–well, it sort of takes some of the shine, I think, off the rest of your life." The justice, according to Murphy, "never got over this defeat."[202] Finally, from late summer of 1951 to December of 1954, Douglas was, to put it bluntly, consumed by ridding himself of his first wife, Mildred, and acquiring the freedom to pursue his nascent romance with his second (of an eventual four), Mercedes.[203] In short, the available evidence from Douglas' biography strongly suggests that he had little time and inclination for approaching *Brown* with anything but his characteristic judicial approach, and is consistent with the possibility that Douglas relied upon non-rational factors, such as gut intuition, in first arriving at, and later, in the face of countervailing evidence, adhering, to his views.

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[201] Murphy (2003, 201-202).
[202] Id., at 231-232.
[203] Id., at 290-299.

CLARK

At the 1952 conference, Clark's comments showed that his concerns about the enforceability of a desegregation order superseded his preference for any particular outcome on the constitutional merits. Jackson records Clark as beginning his remarks by stating that, along with Frankfurter, Clark would like to set *Bolling* down for reagrument: "Favors reargument D.C." [204]Douglas, in contrast, records Clark as beginning his remarks with the admonition that the "result must be the same in all the cases"[205]——that is, in both the states and D.C. This comment likely reflects Clark's sensibilities as one of the Court's few Southerners, or, as Klarman says, "probably evince[s] the typical sensitivity of southern whites to perceived antisouthern prejudice."[206] Drawing on his background, Clark then explained that the racial landscape in Texas was complicated by the "Mexico problem--Mexican boy of 15 is in a class with a negro girl of 12. Some negro girls get in trouble."[207] Jackson recorded that Clark also remarked, "Mexican problem more serious for more retarded."[208] Next, without having spoken explicitly to the question of whether segregation violates the Due Process or Equal Protection Clauses, Clark disposed of the questions of constitutionality and enforceability in one fell swoop: "if we can delay action it will help--opinion should give lower courts the right to withhold relief in light of troubles--he would go along with that--otherwise he would say we had led the states on to think segreggation is OK and we should let them work it out."[209]

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[204] Robert H. Jackson Papers, Box 184, Folder 5, Library of Congress.
[205] William O. Douglas Papers, Box 1150, Library of Congress.
[206] Klarman (2004, 297).
[207] William O. Douglas Papers, Box 1150, Library of Congress.
[208] Robert H. Jackson Papers, Box 184, Folder 5, Library of Congress.
[209] William O. Douglas Papers, Box 1150, Library of Congress.

Clark's pronouncements at the 1953 conference mirrored his of a year before, with one big difference: Clark clarified that he now supported desegregation. Apparently recognizing that after Warren's comments, desegregation was effectively a foregone conclusion, Clark began by highlighting the likely backlash. "Violence will follow in the south--very serious problem--if it is to be abolished it may be handled very carefully."[210] Then, Clark turned his attention to challenges that the diversity of local conditions would pose to enforcement. "[H]e thinks colored students in Texas get as good an education as the whites--various conditions will require different handling--the opinion must indicate that clearly." Next, Clark for the first time in the *Brown* conferences addressed himself to the underlying constitutionality of segregation. "[O]n merits, [Clark] always thought that the 14th Amend covered the matter and outlawed segregation--but the history shows different." Clark subsequently circled back around to enforcement and the insights of his personal experience in Texas. "[P]eople couldn't vote to integrate here and return home to the south," Clark said, evidently anticipating the number of Turncoat Texan contests he would win back home after voting with the burgeoning desegregationist majority on the Court. Douglas described Clark as concluding his second *Brown* conference soliloquy with a reference "to problem between [M]exicans and whites--they are now segregated along the border--does not like the system of segregation and will vote to abolish it but the remedy should be carefully worked out[.]"[211]

Of all the justices', Clark's conformity to the social intuitionist model based on conference remarks alone is the hardest to determine: his comments do not suggest a clear or stable jurisprudential theory or private moral preference regarding segregation, despite his claim in '53 that he "does not like the system of segregation"——a statement that arrived only after desegregation was

[210] Ibid.
[211] Ibid.

a foregone conclusion. It will thus be helpful to review the content of an April 7, 1950 memorandum Clark circulated to the Brethren three days after oral arguments in *Sweatt* and *McLaurin*. The four-page memo is structured according to four numbered points.

1. The "horribles" following reversal of the cases pictured by the States, excepting Oklahoma, are highly exaggerated. […]
2. The issue of *Plessy v. Ferguson*'s application to these cases must be met. […]
3. I think *Sweatt* should be reversed. [i.e., segregation as practiced by the University of Texas Law School invalidated] […]
4. *McLaurin* can, I think, be handled rather summarily. [i.e., disposed of by recourse to the same reasoning as deployed in *Sweatt*].[212]

Clark elaborates on the first point by noting that "Oklahoma was frank enough to admit" that "[t]here would be no 'incidents' … if the cases are limited to their facts, i.e., graduate schools." The real trouble, Clark observed, would come from invalidating segregation in public primary and secondary education: Oklahoma's "concern was the extension of the doctrine [of overruling segregation] to the elementary and secondary schools." Clark acknowledged that he would "be opposed to such extension at this time and would vote against taking a case involving same. Perhaps at a later date our judicial discretion will lead us to hear such a case."

Clark did not elaborate appreciably on point 2. The third point, in contrast, forms the meat of Clark's analysis. "There are two courses," he announced at the outset.

> (a) Overrule *Plessy v. Ferguson*, which would carry with it subsequent cases based on that doctrine. I am opposed to this course.

[212] Tom C. Clark Papers, Box A2. Tarlton Law Library, University of Texas at Austin.

(b) Hold *Plessy* not applicable because it does not involve education; and state that the cases cited therein are not apposite to the *Sweatt* case. Distinguish *Gaines*[213] as holding the State cannot avoid its obligation by furnishing funds for its Negro citizens to attend out-of-state institutions. *Gong Lum* involved elementary schools, and merely held the State was not obliged to furnish separate facilities for each race. *Fisher*[214] and its companion *Sipuel* are not controlling for the question of "separate but equal" was excerpted in the *Fisher* opinion.

This part of the memo evinces clearly that Clark was engaging in motivated reasoning, for from the beginning he proceeded instrumentally with a view to outcome ("There are two courses:"), not deductively from a view of legalist premises to a conclusion. Therefore, his attempt to distinguish *Gaines*, *Gong Lum*, and *Fisher* (all of which accepted the validity of, without directly examining, *Plessy*'s "separate but equal" standard) as precedents for *Sweatt* and *McLaurin* was clearly motivated by a desire or purpose. That purpose, in turn, may be inferred both from Clark's concerns about the reactions of southern states to the implications of the *Sweatt* and *McLaurin* decisions for the constitutionality of segregation in public primary and secondary education and from the memo's concluding lines. As Clark would go on to announce at the end of the memo, "I join with those who would reverse these cases upon the ground that segregated graduate education denies equal protection of the laws. . . . If some say this undermines *Plessy* then let it fall, as have many Nineteenth Century oracles." Consequently, the instrumental objective with which Clark was writing most likely was to erode *Plessy* without overruling it explicitly.

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[213] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) ["separate but equal" requires states to provide in-state educational facilities to blacks; states may not skirt their duty under the Fourteenth Amendment by paying for black students to attend educational facilities out-of-state].
[214] 333 U.S. 147 (1948).

This goal also seemed to motivate Clark's misleading claim that *Plessy* "does not involve education." While it is true that the facts of the immediate case in *Plessy* did not involve segregation in public schools, the Court in its reasoning upheld segregation in railway cars in part by highlighting the constitutionality of segregated education. "Laws permitting, and even requiring, the[] separation [of the races] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power," *Plessy* reads. "The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."[215] Additionally, the Court in *Plessy* in 1896 construed Congress' and the states' recent provision for segregated schools as a warrant for the constitutionality of enforced segregation *per se*.

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana [requiring segregation in railway cars] is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate

[215] 163 U.S. 537 (1896), at 544.

> schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.[216]

So, even if the compatibility of Clark's behavior with the SI model in deciding *Brown* cannot be immediately established, it can be inferred that Clark had previously employed motivated reasoning when considering the constitutionality of segregation in education. In my view, this finding increases the probability that Clark's subsequent ruminations on segregation in education were similarly mediated.

Now, though he employed motivated reasoning (and, in ignoring *Plessy*'s analysis of segregation in public schools, possibly confirmation bias) in discussing the legal rationales available to the Court for eroding *Plessy*'s authority, Clark might well have determined that segregation in graduate education amounted to a violation of equal protection by means of the SI model. "There are good reasons for us not to extend the *Plessy* doctrine to graduate schools," Clark continued under the third point of his *Sweatt* and *McLaurin* memo. Unlike "segregated grammar schools," in which "Negroes [might yet] receive skills in [] elementary subjects equivalent to those of segregated white students, assuming equality in the texts, teachers and facilities," segregated graduate schools cannot but deny equal educational opportunities to black students.

> There are many reasons: (1) white schools have higher standing in the community as well as nationally, which means much to the graduate professional man; (2) the older and larger college has more alumni, which gives the graduate more professional opportunities; (3) the larger and older school attracts better professors; (4) competition among schools is much keener in the older and more established school, thus affording a wider professional competition; (5) the larger and older institution attracts a cross section of the entire State in its

[216] Id., at 550-551.

> student body——affords a wider exchange of ideas——and, in the combat of ideas, furnishes a greater variety of minds, backgrounds, and opinions which is most important in the professions; (6) it takes years and years to establish a professional school of top rank, affording law reviews, competitions, medals, societies, etc., which a Negro school would never attain; (7) acquaintance is important in the professions and segregation prevents it, thus depriving the Negro of many state-wide opportunities. These and other reasons are those which I am sure have led all but nine of the States to abandon the "separate but equal" doctrine at the graduate level.

Some of these reasons might be post hoc justifications, but most of them seem to be the kinds of considerations that would arise in someone with Clark's extensive personal experience of the subject in question. It was, after all, Clark's own legal alma mater, the University of Texas Law School, whose whites-only admissions rule was being challenged in the *Sweatt* litigation. Presumably, then, Clark was able to draw on a wealth of firsthand knowledge and personal experience, even if only anecdotal, to evaluate *Sweatt*'s claim that the state's segregated "black" law school was not comparable to the public flagship Clark had attended. Thus, even though such "reasons" as Clark adduced might not be "moral" in nature, they likely arose in Clark in the same manner as moral intuitions: in the form of flashes of intuition or as epiphanies, accompanied by affective reactions. Such would explain Clark's rather confident assessment, based in his own experience with one of the two, that a segregated "black" law school could in no way be comparable to the long established "white" one in Austin, and that this denial of equal educational opportunity amounted to a violation of equal protection.

The foregoing evidence suggests that Clark's behavior in *Brown*, although harder to clearly subsume under the SI model, nonetheless can be partially explained by SI model correlates. The

evidence also indicates that Clark's strategic concerns about enforcement trumped his moral ones about segregation's injustice, which in turn superseded, or at least preceded, his constitutional conclusions. As we have seen, at the 1952 conference Clark indicated that he thought segregation was constitutional: unless the Court was willing to tolerate delayed or no enforcement in a desegregation decree, the Court "had led the states on to think segregation is OK and we should let them work it out." As a consequence, Frankfurter counted Clark in the "affirm" column in the 1952 term.[217] A year later, though, Clark was willing to state forthrightly that "he doesn't like the system of segregation and will vote to abolish it." Clark nonetheless continued to exhibit a high degree of solicitousness toward the sensibilities of Southerners: "the remedy should be carefully worked out," "various conditions will require different handling," and desegregation must "be handled very carefully." Three mutually compatible explanations might explain Clark's apparent change in heart.

The first is that Vinson's death and absence precipitated Clark's shift. Vinson's and Clark's relationship antedated their appointments to the Court, as both had been colleagues and cabinet members in the Truman administration——Vinson, Treasury Secretary; Clark, Attorney General. Vinson had been Clark's closest friend among the other justices, and the two men had voted together in 90 percent of cases in the three full terms Clark had served on the Court prior to October, 1952.[218] Because Vinson did not ultimately vote in *Brown*, this study does not analyze his comments at the first *Brown* conference, but in the interest of understanding Clark's change of heart, it should be noted that Vinson's remarks on that occasion indicated he believed that segregation

[217] May 20, 1954 Letter from Felix Frankfurter to Stanley Reed. Felix Frankfurter Harvard Law School Papers.
[218] Kluger ([1976] 2004, 614).

was constitutional and that desegregation would be extremely difficult, if not impossible, to enforce in the deep South. For instance, Clark records Vinson as remarking, "[h]ard to get away from continued interpretation of Congress ever since the Amendments – and at that time." In other words, it was hard to ignore Congress' tolerance of racial segregation in the states and the implicit sanction it gave to segregated education in the nation's capital by appropriating money for the District's school system. The rest of Vinson's comments reveal Chief Justice's disquiet about the magnitude and likely impossibility of inducing compliance with a desegregation order: "[i]n Sipuel & McLaurin we said right was personal – more serious when you have large numbers…. It is said we should not consider this but I can't throw it all off. When you force the complete abolition of public schools in some areas then it is most serious."[219] The concerns that Clark expressed at both conferences regarding compliance with a desegregation decree, then, closely echoed Vinson's in the first *Brown* conference. With Vinson's passing, however, Clark might have felt more liberated to follow his instincts as to segregation's basic injustice——which, as we saw in his 1950 *Sweatt* and *McLaurin* memo, when practiced in the context of graduate and professional education, Clark did not hesitate to condemn in unequivocal terms.

The second explanation for Clark's shift between the *Brown* merit conferences is that the passage of time and the continued exposure to arguments against segregation in primary and secondary public education finally broke the dam of reticence that had been built up by concerns, implicit in the 1950 *Sweatt* and *McLaurin* memo and explicit in the justice's comments at both *Brown* conferences, about the South's probable reaction to the desegregation of public schools. In the 1950 memo, Clark had said he favored overruling *Plessy* but "would be opposed to" declaring it inapplicable to "elementary and secondary schools . . . and would vote against taking a case

[219] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

involving" public primary and secondary education. In other words, in 1950 Clark had said *Plessy* should go but implied that he was reluctant it to get rid of it because of the South's likely response. By 1953 what seems to have changed for Clark is the balance of his desire to overturn *Plessy* relative to his preference for forestalling confrontation with the South. Thus the shift in the relative magnitudes of Clark's preferences might be attributable to attitude polarization: exposure to arguments from counsel and conversations among the justices that reinforced his dislike of segregation and *Plessy*, over the course the year between the two *Brown* conferences, might have simply tipped the balance of decision inputs for Clark in favor of voting to invalidate segregation.

The third explanation for Clark's shift is that it was induced by knowledge of Warren's vote, which guaranteed a Court majority for desegregation. Two decades later, commenting to Kluger about the position he took at the 1952 conference, Clark would say, "[y]ou may be ready in your own mind to decide on a case, but think it wiser to hold off – until the circumstances are different."[220] With Warren's replacement of Vinson, and with it, five votes to reverse the lower courts that had sustained segregation under *Plessy*, the circumstances had changed radically by 1953, indeed.

From 1950 until at least the winter of 1952-1953, Clark evidently felt constrained by his (prescient, as it would turn out) foresight of the South's reaction to invalidating segregation in primary and secondary public schools. He succeeded in overcoming that constraint, as I have suggested, for one or several of three reasons. Only the second of these possibilities directly invokes the SI model. Regardless of Clark's motives in ultimately voting with the others to overturn segregation, the evidence shows that the SI model explains at least one crucial aspect of Clark's vote. At the 1953 conference, "on merits [Clark] always thought that the 14th Amend covered the matter

[220] Kluger ([1976] 2004, 615).

and outlawed segregation – but the history shows different."[221] Thus, while having been convinced by the reargument on the legislative history of the Fourteenth Amendment——Bickel's interpretative gloss on the history,[222] and that of the NAACP counsel, notwithstanding——that the Amendment did not "outlaw" segregation, and, presumably, was not intended by its framers to do so, Clark nonetheless voted to read the Equal Protection Clause to invalidate segregation. That Clark never went on the record with a judicial rationale during the *Brown* decision-making process for his vote suggests his attitude toward it may not have been too far from Jackson's: Clark might have seen his vote as one for a "congenial political conclusion," without, however, feeling the attendant need to "make a judicial basis" for it. Clark's conscious willingness to ignore the history of the Amendment, combined with his buffet-style approach to possible rationales for overturning *Plessy* in his 1950 memo, suggests that as regards segregation, for Clark, "judicial" factors were subordinated to moral or political ones.

BURTON AND MINTON

Justices Harold Burton and Sherman Minton are relatively minor personages in the drama of *Brown*. The evidence indicates that the men, both Truman appointees, held relatively consistent views over the two terms and exhibited in their behavior evidence of the psychological dynamics captured by the social intuitionist model. Substantively, both men emphasized the role of precedent and legislative history: on the one hand, the Court's recent graduate school decisions had eroded *Plessy*'s applicability to education, and hence the tenability of affirming the constitutionality of

[221] William O. Douglas Papers, Box 1150, Library of Congress.
[222] See Chapter 5, *infra*.

segregation in public primary and secondary education, and on the other, the Equal Protection Clause outlawed segregation as practiced in the states.

At the 1952 conference, Burton boldly declared that "states do not have choice" because "segregation violates equal protection," and "5th Amendment bars segregation." However, no justice recorded Burton explaining if or how he solved the conundrum that had confounded Black: how due process could suddenly be used to condemn segregation when it had existed peacefully alongside slavery for 72 years, and alongside segregation for another 87. Burton then argued that segregation in education has been eroded by the recent graduate segregation cases: "*Sipuel* and *Sweatt* control." "Education is more than buildings and faculties," he continued, "it's a habit of mind." Finally, Burton's particular conception of American life appeared to exert a decisive effect on his opinion of segregation's constitutionality. "Separate education," he claimed, "is not sufficient for today[']s problems . . . not reasonable to educate separately for a joint life."[223] Burton then concluded by "refer[ring] to his policies as Mayor of Cleveland in putting colored nurses, etc. in white hospitals," which produced interracial "respect" and understanding.

Kluger reports that in a letter to Justice Frankfurter a few months prior to the December 1952 conference, Burton had expounded upon his view that blacks and whites did and should share a "joint life". In that missive, Burton stated:

> I have been increasingly impressed with the idea that under conditions of 50 or more years ago it probably could be said that a state's treatment of negroes, within its borders, on the basis of "separate but equal" facilities might come within the constitutional guaranty of an "equal" protection of the laws, because the lives of negroes and whites were then and there in fact *separately* cast and lived. Today, however, I doubt that it can be said in any state

[223] Hockett (2013, 66).

(and certainly not generally) that compulsory "separation" of the races, even with equal facilities, *can* amount to an "equal" protection of the laws in a society that is lived and shared so "*jointly*" by all races as ours is now.[224]

Thus, for Burton, perhaps the decisive factor that rendered segregation unconstitutional was the recent change in how the races comingled and lived: if in fact members of both races lived and worked side-by-side, it appeared ludicrous to Burton that they should be isolated artificially, not to mention futilely, by the state.

These remarks provide direct evidence that the dynamics described by the social intuitionist model exerted some effect on Burton as he "came to his senses" with respect to segregation. Burton's comments regarding racial comingling in both his letter to Frankfurter and at the 1952 conference are structured as an argument, but his statements lack the cogency that would indicate that the justice reached his conclusion via *reasoning*. Instead, Burton's pronouncements suggest that he found something about forced separation offensive, when Americans of different races sharing a "joint life" seemed to him innocuous and inevitable. His observation was that Americans of different races in fact comingle. His conclusion was that the state should not impede them from doing so. But the conclusion does not ineluctably follow from the premise: that X occurs does not imply that government must permit X. Other premises (such as, e.g., no harms arise from such comingling, or that such comingling is desirable) are necessary to reach the deduction Burton advances, but the remainder of his comments are wholly devoid of the necessary additional reasoning. Perhaps Burton's mention of his positive personal experience with and observation of integration is intended to supply the missing premise. If so, however, it is a tenuous premise: a personal experience does not suffice for a generalizable principle. In other words, it is not true to conclude

[224] Kluger ([1976] 2004, 612-613).

that because one's particular experience with X is Y, that all X are likely to (or do) produce Y. However, precisely these personal observations of questionable representativeness clearly comprised some part of the information universes of most of the justices. Warren, Black, Reed, Clark, and (as we will see) Frankfurter, Minton, and Jackson——six of the nine justices——used such information to supply premises of controvertible accuracy that helped shore up arguments for conclusions they proffered. Regardless of the empirical validity of those insights, they are evidence of intuitive decision-making. The justices' intuitions and emotions primed them to lean in the direction of a certain disposition, and "reason" supplied the remainder of the appropriate argument.

Again, none of this is to denigrate any of the justices' decision-making. It is only to give the most likely account of at least some of the primary *causes* of their behavior. If the evidence suggests erroneous reasoning, allusions to personal experiences, confirmation bias, and the like, then it is exceedingly unlikely that *reasoning* caused the judgment or outcome advanced by the justice, and likely instead that *intuition* played a causal function, though the level at and extent to which intuition operated is open to question. Finally, the causal role of intuition helps explain individual justices' lack of a coherent, reasoned position steeped in the traditional sources of constitutional interpretation.

Another respect in which the social intuitionist model captures Burton's decision-making pertains to the justice's record of the performance of the NAACP counsel in his diary. As Kluger recounts, "[b]eside the name of each NAACP lawyer in *Brown*, all of whom he rated from 'good' to 'excellent,' he also wrote: '(colored).'"[225] I think the most plausible interpretation of this information is that the black counsel made a similar impression on Burton as on Warren: the example they provided eliminated the plausibility of the strongest form of the white supremacy claim, that

[225] Kluger ([1976] 2004), at 613.

is, that blacks are categorically inferior to whites. If true, this insight would likely have worked its way into Burton's view that "the life of today" countenanced and even required racial integration by reinforcing his unstated premise that such integration entails only benefits for members of both races, and that members of each race is equipped to contribute equally to that shared life.

At the 1953 conference, Burton hewed substantially to the position he expressed a year prior. He reiterated his position that the Equal Protection Clause of the Fourteenth Amendment and Due Process Clause of the Fifth Amendment prohibited segregation, once more without attempting to resolve Black's concern about the inadequacy of a due process argument to constrain Congress in the matter. Again highlighting his belief that *Sweatt*, *Painter*, and *Sipuel* had eroded *Plessy*, and his view that public primary and secondary education were not distinguishable from higher education, Burton contended that the Court "can't draw a line between types of schools"; the "principle applicable to graduate schools is applicable to primary school." Modifying the crux of his '52 position ever so slightly, the justice said that "At time of the 14th Amendment life was separate." But by the 1950s segregated education afforded only "inadequate preparation for the life [of] today."[226]

The reason for Burton's shift in this line of argument from his claim that segregation might have been rational "50 or more years ago" to the contention that segregation might have been so at the time of the adoption of the Fourteenth Amendment was almost certainly due to the historical information acquired during the '53 rehearings. While Burton's argument remained effectively the same as the year before, he evidently felt no compulsion to engage with any of the evidence presented on reargument that suggested that the framers and ratifiers of the Fourteenth Amendment did not intend their handiwork to command social equality between the races. Foreshadowing

[226] Hockett (2013, 74).

Warren's treatment of the Amendment's history in the eventual *Brown* opinion, Burton's neglect of that history in '53 implied that he viewed it as either inconclusive or unimportant. The justice's apparent certainty and paucity of buttressing specificity——his refusal or failure to confront the historical evidence favoring the legal position of the states——suggest that he was somewhat unjustifiably discounting countervailing evidence, and therefore engaged in motivated reasoning. As I have said before, the point is not to say the justice should have had a different view of the evidence, only that a decision compelled by *reasoning* would have been much more likely to engage with, and provide justifications for disregarding, the historical materials unfavorable to his position. Only two justices, Frankfurter and Jackson, ended up doing so appreciably.

Justice Minton's position tracked Burton's but was framed more forcefully. At the '52 conference, Minton observed that *Plessy* "has been whittled away" by the graduate education cases. Then, like Douglas, he assumed an anti-classification position. "Classification on the basis of race is invidious and can't be maintained."[227] Clark records him as saying, "can't classify as to race bad – invidious – This is a race that grew up in trouble." Evidently to quell enduring fears that the Fifth Amendment might not impose upon the federal government the same constraints as the Fourteenth applied to the states, Minton rather matter-of-factly declared, "It's not legal," the "it" being segregation. "Segregation is per se unconstitutional."[228]

Like Douglas' remarks, Minton's are noticeably devoid of the additional reasoning necessary to compel the anti-classification conclusion that forms the affirmative basis (that is, independent of his opinion of *Plessy*'s viability) for invalidating segregation. Perhaps both Minton and Douglas felt that the other members of the Court would be sufficiently acquainted with the chain

[227] Id., at 67.
[228] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

of premises involved in the argument to bother expounding them. But then, perhaps, neither had developed the argument to a sufficient level of detail to present it to his colleagues convincingly. In either case, both men's pronouncements carry the distinctive smack of rationales found after the outcome has been decided upon. The moderately adversarial environment presented by the justices' conference would also seem to provide additional impetus to flesh out such an argument. Why, for example, is segregation invidious, when at least one of the Court's members (Reed) and a host of states claim it is a rational response to "respectable" concerns about racial harmony and integrity? Again, the point is not to suggest that Minton should have concluded other than he did. It is only to observe that his reasoning was less than adequately developed, suggesting that it was a post hoc veneer for a decision reached via other, and likely intuitive or emotive, avenues.

A year later, at the 1953 conference, Minton reaffirmed his '52 position but buttressed it with novel theories, "courtesy," as Hockett dryly observes, "of the LDF" [NAACP Legal Defense Fund]. Minton first repeated his contention from the previous year that the graduate education decisions, especially *McLaurin*, "greatly weakened" *Plessy*'s claim to control in public primary and secondary education. There is no "valid distinction in *color*." Now echoing Warren, Minton then proclaimed that "the only basis left" for sustaining segregation is a belief in the "inferiority of blacks." Next, he endorsed the LDF's argument that the objective of the Civil War Amendments "was to wipe out the badge of slavery," presumably, by eradicating state legislation perpetuating all kinds of inequalities, not just civil and political ones. The Fourteenth Amendment, Minton stated, "says 'equal' rights not separate but equal;" Plessy's dictum "is a lawyer's addition to the language." Then, endorsing the NAACP's interpretation of the first equal protection cases to come before the Court, the justice argued that "the *Slaughter* and *Strauder* cases," whose spirit is contrary to that of *Plessy*, embodied the Amendment's true intent. Finally, Minton clarified that in

addition to offending equal protection, segregation constitutes "a denial of due process," and is therefore proscribed by the Fifth Amendment as well.[229]

What distinguishes Justice Minton's comments at the second *Brown* conference is the degree to which he appropriated new rhetorical and persuasive resources, "courtesy of the LDF," to reinforce a position for which he had expressed a strong preference the year prior. Minton made no attempt to address the states' different reading of the historical evidence, and borrowed from the historical record only insofar as it supported his preference regarding the cases' outcome. Therefore, the justice's success in finding new reasons for his pre-existing position by borrowing from one half of the historical information presented at the '53 rehearings is consistent with confirmation bias (fixating upon and construing as dispositive materials and theories amenable to his position), motivated reasoning (failing even to address, much less refute, any countervailing evidence) and, of course, intuition as causative of reasoning (if indeed the justice "reasoned" his way through the historical materials, we would expect to see some commentary from Minton as to why the materials upon which he relied were superior to or more appropriate as a basis for judicial decision-making than the historical evidence advanced by the states).

[229] Hockett (2013, 74-75).

Chapter 5. Alexander Bickel and the Legislative History of the Fourteenth Amendment

Felix Frankfurter requested reargument at the first *Brown* conference both to "buy time" so that the justices, who appeared divided 5-4 or 6-3 on the merits in 1952, could coalesce around a shared outcome and constitutional rationale,[230] and, as Chapter 6 will show, to dredge up evidence that would allow him to overcome his own judicial impasse. To the latter of these ends, Frankfurter tasked his 1952 term clerk and future academic epigone Alexander Bickel with a term-long research project: to read the *Congressional Globe*'s record of the debates surrounding the 39th Congress' adoption of the Fourteenth Amendment and to report what he believed the framers' views of their handiwork was. As Frankfurter wrote to the Brethren the first time he first disseminated the Bickel memo,

> Having become convinced of the unreliability of the most quoted account of the history of the Fourteenth Amendment,[231] I had one of the most dependable of the law clerks I have had, Alexander Bickel, devote many weeks at the last Term to the reading of every word in the Congressional Globe relating to the history of what ultimately became the Fourteenth Amendment, including theretofore also the history of related measures.[232]

Bickel completed the memo by late August of 1953, and Frankfurter corrected it in his own hand, had it reproduced on the Court printer, and distributed copies to the justices on two occasions during the 1953 term——on December 3, a few days prior to the *Brown* rehearings, and on May 18, the day after *Brown* came down.[233]

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[230] Kluger ([1976] 2004, 618).
[231] Horace Edgar Flack's *Adoption of the Fourteenth Amendment* (Flack 1908).
[232] Felix Frankfurter Harvard Law School Papers.
[233] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

THE HISTORY OF THE AMENDMENT

There are two versions of Bickel's memo. The first is the one to which the justices had access: the copy Frankfurter twice distributed to the conference. The second is a revised and expanded form of the memo that Bickel published in the Harvard Law Review in 1955. Although the expanded version of the memo was published after *Brown* and therefore did not directly influence the justices' decision-making, the second memo is instructive insofar as it illuminates Bickel's method of historical inquiry, the purposes that inquiry was evidently made to fulfill, and, possibly, some of theories that he and Frankfurter had been batting around privately.

At first glance, the findings of Bickel's historical inquiry appeared not just unhelpful, but counterproductive to his boss's desire, so evident in the questions that he and Bickel wrote and in response to which the rehearings were ordered, to locate historical evidence that the Fourteenth Amendment had been misunderstood and misapplied since conception. Bickel noted that Section 1 of the Amendment, which contains the Due Process and Equal Protection Clauses that the Court sought to use as the bases for invalidating segregation, was intimately linked to the passage of the Civil Rights Act of 1866. The relevant language of the Civil Rights Act reads as follows.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and

> equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[234]

That Act, in turn, had undergone several revisions to eliminate language that might be susceptible of "latitudinarian" future interpretations. In particular, the Joint Committee on Reconstruction, which drafted both the Civil Rights Act and Fourteenth Amendment, chose to delete language from the first draft of the bill which declared: "That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery."[235] This language originally appeared after the semicolon in the block quote above. It was ultimately removed by the intervention of Ohio Congressman John Bingham, who would go on to author Section 1 of the Fourteenth Amendment.

In debate over the bill on the floor of the House, Bingham foreshadowed President Johnson's criticism of the bill by declaring that Congress lacked the constitutional power to prohibit "discrimination in civil rights" by and throughout the states. For Congress to proscribe such discrimination, Bingham proclaimed, would upset the country's federal structure: "'centralized government, decentralized administration.' That, sir, coupled with your declared purpose of equal justice, is the secret of your strength and power." Moreover, the language would force state judges to choose between upholding the constitutions and laws of their states and their oaths to abide the national Constitution. "You propose to make it a penal offense for the judges of the States to obey the constitution and laws of their States," Bingham stated. "I deny your power to do this. You

[234] Paulsen et al. (2016, 1264-1265).
[235] Bickel (1955, 11).

cannot make an official act, done under color of law . . . and from a sense of public duty, a crime."[236] Finally, the Bill's original formulation providing for "no discrimination in civil rights" was susceptible of being interpreted to cover political rights. "[T]he term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country," Bingham declared. "[A]re not political rights all embraced in the term 'civil rights,' and must it not of necessity be so interpreted?"[237] In 1866, the insinuation that a proposed statutory or constitutional clause might include political rights comprised a death knell for the relevant wording. Bingham did, however, clarify that he personally favored what he understood to be the aims of the original "civil rights" formulation.

> Now what does this bill propose? To reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws. I humbly bow before the majesty of justice, as I bow before the majesty of that God whose attribute it is, and therefore declare there should be no such inequality or discrimination even in the penalties for crime[.][238]

It should be noted, however, that "no discrimination between citizens on account of race or color in civil rights or in penalties prescribed" by law, and Bingham's description of its policy implications, is less expansive than the interpretation incorporating social and political rights that the Court sought in *Brown* to impute to the Equal Protection Clause of the Fourteenth Amendment. Of course, Bingham's pronouncement on the Civil Rights Act did not necessarily express his view of the meaning of Section 1 of the Fourteenth Amendment, but because Section 1 was, as we will

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[236] Id., at 24.
[237] Id., at 23.
[238] Id., at 23-24.

see, written deliberately to be narrower than the Civil Rights Act, Bingham's remarks on the scope of the Act circumscribes the meaning he could have imputed to Section 1 of the Amendment. One of two relationships therefore exists between the Civil Rights Act and the Fourteenth Amendment. One possibility is that the Fourteenth Amendment "constitutionalized" the Civil Rights Act by providing indisputable constitutional authority for the Act in Section 1, and by granting Congress power to enforce that language in Section 5. On this view, the restrictions Section 1 authorizes are those specific rights enumerated in the final language of the Civil Rights Act. Another possibility is that Section 1 has a broader scope than the Civil Rights Act, but that scope is coextensive with the policy preferences of Section 1's author. Bingham expressed that preference when communicating his policy agreement with the original "civil rights" formulation of the Act: "there shall be no discrimination between citizens on account of race or color in civil rights or in penalties prescribed by [state] laws." As we will see below, because Bingham appeared to believe that the civil rights formulation he attacked here as unconstitutional, when he presented in the context of a constitutional amendment, was not redundant with the eventual "equal protection of the laws" wording of the final proposed Amendment, it is overwhelmingly likely that Bingham believed the "equal protection" phraseology set an even lower latitudinarian limit on the meaning of Section 1 than did his apparent personal preference that there "be no such [racial] inequality or discrimination even in the penalties for crime."

After his speech, Bingham moved to delete the civil rights formulation from the bill. Bickel interpreted Bingham's speech and proposal to strike to signify not merely that Bingham had doubts about the bill's constitutionality, but that the term "civil rights" was too susceptible of unintended, latitudinarian constructions: "Unless one concludes that Bingham entertained apprehensions about the breadth of the term 'civil rights' and was unwilling at this stage, as a matter of policy, not

constitutional law, to extend a federal guaranty covering all that might be included in that term, there is no rational explanation for his motion to strike it."[239] Illinois Congressman James Wilson, the bill's floor manager in the House, responded to Bingham by claiming that the bill's civil rights formulation protected only *federal* civil rights.

> My friend [Bingham] .... knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill ... he steps beyond what he must know to be the rule of construction which must apply here, and as a result of which this bill can only relate to matters within the control of Congress.

Bickel notes that Wilson's description of Bingham's position is a misinterpretation, but, though true, that observation is inapposite to the import of Wilson's remarks for the Civil Rights Bill: that the legislation was intended and understood by the House leadership only to prohibit states from violating civil rights that were traditionally understood to apply against the national government. However, what precisely those were under the civil rights formulation was not stated.

The House voted overwhelmingly against Bingham's motion to recommit with instructions to delete the civil rights formulation. However, it then voted by a much closer margin (82-70) to recommit the bill without instructions, i.e., to direct the Joint Committee to revise the bill generally. The Joint Committee ended up removing the civil rights formulation anyway and Wilson resubmitted the bill to debate four days later after. At that time, he said: "Mr. Speaker, the amendment which has just been read proposes to strike out the general terms relating to civil rights. I do not think it materially changes the bill; but some gentlemen were apprehensive that the words we

[239] Id., at 25-26.

propose to strike out might give warrant for a latitudinarian construction not intended."[240] After some more procedural wrangling, the House adopted the Bill by a "large" majority, according to Bickel, although Bingham himself voted nay, perhaps because Wilson demanded an immediate vote and would not allow the revised bill to be printed and distributed to members for more extensive consideration.

The first iteration of the Civil Rights Act was vetoed on March 27, 1866, by President Johnson, who articulated two constitutional objections. First, Congress could not constitutionally abrogate to itself the power to determine state citizenship, for "the power to confer the right of State citizenship is just as exclusively with the several States as the power to confer the right of Federal citizenship is with Congress." Second, "[h]itherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States." The Act attempts to establish "a perfect equality of the white and colored races [] by Federal law in every State of the Union over the vast field of State jurisdiction covered by these enumerated rights." But Congress lacks the constitutional power "to make rules and regulations" for the States that it possesses, by the terms of Article IV, Section 3, over the territories.[241]

Though Congress quickly re-enacted the law with the two-thirds majority in both chambers required to override President Johnson's veto (after deleting from the bill language that might have been construed to extend suffrage to blacks), concerns among members of Congress that the national government lacked constitutional authority to define state citizenship and legislate on civil rights predated Johnson's veto (as we have already seen from Bingham's motion to recommit with instructions). The constitutional authority for the Civil Rights Bill was supposed by many members

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[240] Id., at 28.

[241] President Johnson's Veto of the Civil Rights Act, 1866. Available at http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf. Accessed September 1, 2017.

of Congress to be Section 2 of the Thirteenth Amendment, which others (including Bingham) found woefully unsatisfactory, since Section 1 dealt with emancipation, and emancipation had been achieved by the military defeat and occupation of the South. Accordingly, the Joint Committee on Reconstruction——formed by Thaddeus Stevens and intended to serve as an institution by which Congress could commandeer reconstruction of the South from what Radicals and many Moderates perceived as a reticent, obstructionist president——had since January of 1866 been mulling two proposals that would have provided a more unequivocal constitutional authority for congressional reconstruction than the Thirteenth Amendment.

The first was submitted by Bingham and read in its entirety: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property." The second, authored by Stevens, stated in similarly succinct fashion: "All laws, state and national, shall operate impartially and equally on all persons without regard to race or color."[242] The Joint Committee also considered three proposals submitted by the Chairman, Maine Senator William Fessenden, which made provisions of various strength and immediacy for black suffrage. The first, Article A, provided in part that "all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void." The second, Article B, formed the basis for what would become Section 2 of the Fourteenth Amendment, reducing states' representation in Congress if they denied blacks the right to vote. The third, Article B, read in its entirety: "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty

[242] Bickel (1955, 30).

and property." The Joint Committee quickly decided not to try to push for suffrage for blacks, and so abandoned Article A and reported Article B to Congress for consideration as its own Amendment (it would go down to defeat due to the opposition of Radical Republicans, who at the time insisted on immediate suffrage.) Article C was referred to a subcommittee composed of Bingham and two other members, who reported the Article back to the Joint Committee a few days later with the following wording: "Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges."[243]

"The same political rights and privileges" of Article C had become "the same immunities and also equal political rights and privileges," while "equal protection" had become "full protection," and the order in which the clauses appeared was reversed. Thaddeus Stevens exhorted the Joint Committee to report the revised Article C out to Congress for consideration as an independent constitutional Amendment, but lost the vote: "[f]our Republicans were absent and three voted nay."[244] Bingham flew the rescue with a compromise substitution for Article C: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)."[245] The Joint Committee voted this version out to Congress for consideration. The proposed text became known as the "Bingham Amendment," and was the first iteration of Section 1 of the Fourteenth Amendment that the House debated.

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[243] Id., at 30-31.
[244] Id., at 32.
[245] Id., at 33.

In his survey of the record of congressional debate on this language, Bickel noted that "[a]side from [Pennsylvania Congressman William Kelley] … and from Bingham, later, when he was responding to attacks, the supporters of the amendment had little if anything specific to say about the kind of state action to which [the Bingham Amendment] was directed. This contrasts with the speeches made in behalf of the Civil Rights Bill."[246] It is for this reason that Bingham's remarks about the scope and meaning of the Civil Rights Bill are relevant to, which is not to say dispositive of, an understanding of those of Section 1 of the Fourteenth Amendment. Nonetheless, the exchanges between proponents and critics of the Bingham Amendment illustrate how members of the House understood language very similar to that which would appear in the final form of the Fourteenth Amendment.

The first enlightening exchange occurred on the very first day of debate over the Bingham Amendment, on February 26, between Robert Hale of New York, Bingham, and Thaddeus Stevens. Hale precipitated the exchange by claiming that the language of the proposed Amendment, far from being "a subject of the most trivial consequence," as its proponents had represented it, was "in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden . . . and the law of Congress established instead." He went on to claim, in Bickel's summation, that "all states distinguished between the property rights of married women on the one hand, and of '*femmes sole*' and men on the other" but that "such distinctions would be outlawed" by the proposed Amendment. Stevens answered Hale's peroration by denying that the language banned class legislation, adopting, as Bickel notes, a proto-rational basis scrutiny argument: "[w]hen a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the

[246] Id., at 34.

same class are dealt with in the same way then there is no pretense of inequality." Hale continued to press his point, however, insisting that the language of the Amendment "gives to *all persons* equal protection," and Stevens failed or declined to muster a rejoinder.[247] The upshot of this exchange is that Hale, who opposed the language, thought that the proposed Amendment might be abused to undermine reasonable legislative classifications. Stevens, in contrast, appeared not to believe that the Amendment extended to sex classifications. In any case, the beginning of the exchange provides evidence that neither Stevens nor Hale believed that it was wise to require the elimination of all class legislation, even if the latter believed the proposed Amendment could be so construed, and the former could not muster a convincing riposte to the latter's concerns.

Next, Bingham responded to Hale by pointing out, in a clear allusion to the Black Codes, that (once again in Bickel's words) "property rights and procedural rights in courts of law had been denied by some states…. Was not some protection needed?" Hale proposed that affected individuals could flee such states and migrate, for example, to his own home state of New York, where their rights would be protected. Bingham replied: "I do not cast any imputation upon the State of New York. The gentleman knows full well, from conversations I have had with him, that so far as I understand this power, under no possible interpretation can it ever be made to operate in the State of New York while she occupies her present proud position."[248] Bingham went on: "It is to apply to other States [than those which seceded] . . . that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution." Finally, in response to a question by a member asking if Bingham's remarks applied to Indiana, Bingham replied: "I do not know; it may be so. It applies unquestionably to the State of Oregon."

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[247] Id., at 36.
[248] Ibid.

Bickel pointed out that at that time (and until 1900), New York law reflected the *Plessy* dispensation, permitting "separate but equal schools for colored children in the discretion of local districts."[249] It is impossible to know whether Bingham was aware that New York law permitted segregation in schools. But what his remark about New York's "present proud position" does suggest is that Bingham's understanding of the reach of the proposed Amendment was at least consistent with legislative classifications employed by those states not recently in rebellion against the Union, and not egregiously discriminating against blacks in the right of movement or in basic legal protections for person and private property. It is for this reason that Bingham apparently singled out Oregon as an exemplar of a loyal state whose practices would run afoul of the Amendment's thrust. Bickel remarked: "[t]he Oregon constitution at this time … forbade free Negroes or mulattoes not residing in the state at the time of its adoption to come into the state, reside there, hold real estate, contract, or sue. This sort of thing Bingham wanted to strike down."[250] Piecing together Bingham's comments on New York and Oregon indicates that Bingham intended the Amendment to outlaw gross violations of common law protections for person, property, and movement, but not to outlaw legislative race classifications regulating social policy, such as marriage and education. Whether or not Bingham was aware of the precise laws on the books in Northern states requiring segregated education or banning interracial marriage, these matters did not rise to a level of salience that attracted his attention and ire, as did, for instance, Oregon's practices. Therefore, as far as Bingham's personal "intention" and "purpose" in authoring the Fourteenth Amendment are concerned, the foregoing strongly suggests that they extended to eliminating the

[249] Id., at 37.
[250] Ibid.

very worst contemporaneous abuses of blacks throughout the country. These abuses were undoubtedly more prevalent and egregious in the South, where they took the form of Black Codes, and they also occurred sporadically throughout the North (as in Oregon), but in no instance would the social policies of these states be identified by Bingham as appropriate objects of the Fourteenth Amendment's proscriptions.

One final speech from the House's initial consideration of the language that was to become Section 1 of the Fourteenth Amendment is worth examining. New York Congressman Giles Hotchkiss, a Radical Republican, believed the Amendment did not go far enough. "As I understand it … [Bingham's] object in offering this resolution … is to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it to-day; but … I do not regard it as permanently securing those rights…." Hotchkiss also objected to the extent of the power the Amendment contemplated granting Congress. "It is not indulging in imagination to any great stretch," he said, "to suppose that we may have a Congress here who would establish such rules in my State as I should be unwilling to be governed by."[251] Finally, Hotchkiss said he felt Bingham's views "upon this matter" were not "sufficiently radical" and that Hotchkiss would prefer the Amendment "go to the root of this matter." What he thought might do so was a blanket prohibition on class legislation. "Why not provide by an amendment to the Constitution," he asked, "that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another[?]"

Apparently, most of the Radicals (including Stevens) and the Moderates thought that the Amendment did not ban class legislation, while the Democrats and Conservatives thought it might

[251] Id., at 39.

one day be twisted by an overly ambitious Congress to do so. Despite Stevens' and Bingham's attempts from February 26 to 28 to assuage fears over Hale's concern that the language of the proposed Amendment was overly latitudinarian, "Hale's argument," Bickel tells us, "had sunk in and was going to prevail."[252] Two motions were consequently proposed: one to delay consideration of the Bingham Amendment indefinitely, the other to delay consideration until the second Tuesday of April. The first failed; the second, supported by the Republican leadership and Bingham himself, carried. However, the Amendment in this form was never heard from again: "The second Tuesday in April came and went with no further mention of the Bingham amendment."[253] Evidently Hale's suggestion that the Bingham Amendment might be interpreted to ban all class legislation——i.e., precisely what the Court in *Brown* sought to construe the Fourteenth Amendment to read——had alarmed enough members to kill the amendment. None of the justices who decided *Brown* left any evidence in the primary source record that they confronted or overcame this or any other challenge arising from the legislative history of the Fourteenth Amendment to interpreting the Equal Protection Clause to announce precisely the rule that the 39th Congress took pains to avoid enshrining in the Constitution, as evidenced by the House's *de facto* rejection of the Bingham Amendment.

The failed Bingham Amendment was superseded by a proposal drafted by Robert Dale Owen and introduced by Stevens in the Joint Committee on April 21. That newly suggested Amendment provided (again, in Bickel's recapitulation):

> Section 1. No discrimination shall be made by any state, nor by the United States, as to civil rights of persons because of race, color, or previous condition of servitude.

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[252] Ibid.
[253] Id., at 40.

Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment … of the right of suffrage….

Sec. 3. [Excluded all persons who were denied suffrage from the basis of representation, till 1876.]

Sec. 4. [Confederate debt and compensation for slaves.]

Sec. 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article.

And be it further resolved, [former Confederate states which ratified this amendment and enacted legislation in compliance with it, to be readmitted to the Union, when ratification of the amendment was complete.]

Provided, [that certain "rebels" be excluded from office till 1876.][254]

Though the Bingham Amendment was dead, its author had not given up on the limited form of the principle he (not Hotchkiss) understood and intended it to embody, and now maneuvered to insinuate that principle into the new proposal. Bickel remarked that Bingham first proposed adding to Section 1 the following wording: "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." This suggestion was defeated by a vote of 7 to 5. The Committee then voted 10 to 2 to accept Section 1 as it appeared, with Bingham, his motion defeated, this time agreeing to Section 1's wording. When the Committee took up consideration of Section 5, Bingham suggested substituting the existing text with what would become the final wording of most of Section 1 of the Fourteenth Amendment: "Sec. 5. No state shall make or enforce any law which shall

[254] Id., at 41.

abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This time, the Committee agreed to adopt Bingham's suggestion by a vote of 10 to 2, with the same division among participants as had occurred on the vote over the final wording of Section 1.

The Committee met once more on April 23, but failed to make any changes affecting the Bingham language. When the Committee reconvened on April 25, however, Oregon Senator George Williams moved to delete the Bingham-reworded Section 5. This vote carried 7 to 5. After the Committee then voted to report out the whole package, Bingham, demonstrating impressive persistence, moved to propose his deleted Section 5 as an independent constitutional Amendment from the one emerging from the Owen draft. He lost this vote 8 to 4. Shortly thereafter another Committee member proposed rescinding the Committee's prior vote to report out the package to Congress, and the Committee agreed, reversing its earlier decision 10 to 2 before adjourning. On April 28, the Committee met again. Bingham moved to substitute his deleted Section 5 wording for Section 1. This motion finally carried 10 to 3, the Democrats joining Bingham, Stevens, and others. Two of the three opposition votes were Radical Republicans; the third, a Moderate Republican. The Committee voted out its final handiwork 12-3, with all three Democrats in opposition.

Several observations regarding the significance of these legislative machinations are in order. Bingham's April 21 proposal would have recast Section 1 to read as follows: "No discrimination shall be made by any state, nor by the United States, as to civil rights of persons because of race, color, or previous condition of servitude, *nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just*

compensation."[255] Unless Bingham was blithely indifferent to redundancy, his proposal demonstrates that he understood "no discrimination … as to civil rights of persons" and "equal protection of the laws" *to mean distinct things*. Whether in a world solely of his own making Bingham would have included both is doubtful due to the concerns he expressed during debate over the Civil Rights Bill about the undesirable "latitudinarian" applications to which the phrase "No discrimination … as to civil rights" was susceptible. As we have already seen, although Bingham claimed during the Civil Rights Bill debate personally to prefer that states abide the "no discrimination" principle as a matter of discretion, not only did he never speak in favor of rendering it constitutionally compulsory, but he went on the record to oppose making it statutorily compulsory, apparently, as Bickel pointed out, due to substantive considerations of justice or policy in addition to merely legal reasons (i.e., lack of existing constitutional power to do so).

What is clear is that Bingham repeatedly sought to incorporate the principle embodied in the failed proposed Amendment bearing his name. His April 21 proposal is strong evidence indeed that he believed that that principle and the "no discrimination" civil rights formulation meant different things. Moreover, Bingham's evident lack of interest in advancing a civil rights formulation, when contrasted with his unrelenting push for the Committee to incorporate his stricken Section 1 wording in any possible position in the Amendment (or, even independently of the Owens draft, as a proposed Amendment of its own), strongly indicates Bingham did not seek to constitutionalize a command that there shall be "no discrimination … as to civil rights," despite the preference he expressed during the Civil Rights Bill debate two months before that all state laws abide that principle. Finally and most importantly, because Bingham evidently viewed the civil rights formulation and his own equal protection language as signifying different things, and was interested solely

[255] Bingham's proposed addition italicized.

in "constitutionalizing" the latter, "No state shall … deny to any person within its jurisdiction the equal protection of the laws" must mean something different, at least as far as Bingham was concerned, than "No discrimination shall be made … as to civil rights of persons because of race, color, or previous condition of servitude."

The probability that a man of Bickel's accomplishments and intelligence did not detect the implications of Bingham's April 21 proposal in the Joint Committee is vanishingly small. But Bickel did not express those implications in either version of his memo. Bickel instead emphasized the change in phrasing from the Bingham Amendment to Section 5 (later Section 1) of the Owens draft that would become the Fourteenth Amendment: "As regards negro rights, there is no internal indication whether the 'equal protection of the laws' formula (*nota bene* – 'of the laws,' not 'in the rights of life, liberty and property,' as in the earlier Bingham amendment) was thought by the Committee to imply greater or lesser coverage than the term 'civil rights.'" Moreover, in the "Summary and Conclusions" section of his Harvard Law Review article (which did not appear in the memo that Frankfurter twice distributed to the conference during the 1953 term), Bickel argued that this change in phrasing rendered the language more capacious or indeterminate than protection "in the rights of life, liberty and property."

> One would have to assume a lack of familiarity with the English language to conclude that a further difference between the Bingham amendment and the new proposal was not also perceived, namely, the difference between equal protection in the rights of life, liberty, and property, a phrase which so aptly evoked the evils uppermost in men's minds at the time, and equal protection of the laws, a clause which is plainly capable of being applied to all subjects of state legislation. Could the comparison have failed to leave the implication that

> the new phrase, while it did not necessarily, and certainly not expressly, carry greater coverage than the old, was nevertheless roomier, more receptive to "latitudinarian" construction? No one made the point with regard to this particular clause. But in opening debate in the Senate, Jacob Howard was frank to say that only the future could tell just what application the privileges and immunities provision might have. And before the vote in the Senate, Reverdy Johnson, a Democrat, to be sure, but a respected constitutional lawyer and no rabid partisan, confessed his puzzlement about the same clause. Finally, it is noteworthy that the shorthand argument characterizing the fourteenth amendment as the constitutional embodiment of the Civil Rights Act was often accompanied on the Republican side by generalities about the selfevident demands of justice and the natural rights of man. This was true both in Congress and in the course of the election which followed. To all this should be added the fact that while the Joint Committee's rejection of the civil rights formula is quite manifest, there is implicit also in its choice of language a rejection——presumably as inappropriate in a constitutional provision——of such a specific and exclusive enumeration of rights as appeared in section 1 of the Civil Rights Act.[256]

Bickel's reading of the evidence is somewhat forced. As we have already seen, the House first failed to approve, and then let die, the Bingham Amendment, not only due to fears about the "necessary and proper" power it would have afforded Congress over legislating with regard to civil rights, but also because of the broadly shared view that the "no discrimination … as to civil rights" formulation was too "latitudinarian." The House was, in other words, on guard against language that was susceptible of runaway constructions by future Congresses. It is unlikely, therefore, that

[256] Id., at 60-61.

many members viewed the familiar "due process" and novel "equal protection of the laws" wordings as more susceptible of future latitudinarian distortion than the "equal protection in the rights of life, liberty and property" formulation of the Bingham Amendment. As Democratic New Jersey Congressman Andrew Jackson Rogers said during the debate over the latter, "I defy any man upon the other side of the House to name to me any right of the citizen which is not included in the words 'life, liberty, property, privileges, and immunities,' unless it should be the right of suffrage."[257] "Equal protection of the laws," on the other hand, seems to strike at precisely the kind of ills Bingham complained of while defending his eponymous Amendment to a skeptical Congress, without guaranteeing to blacks, as Rogers claimed the Amendment's language would, "the right to marry white women"[258] or, more generally, invalidate legislative racial classifications regulating social and political rights. Consequently, "equal protection of the laws" seemed, in Bingham's opinion, and the House's understanding, to provide a minimum level of protection for blacks against legislative attacks on the legal rights surrounding person, property, and movement. At the very least, the evidence suggests that had the House believed the "equal protection of the laws" formulation promised more, any constitutional provision sporting it would have followed the Bingham Amendment to oblivion or defeat.

The remarks Bingham delivered during the debate over his eponymous constitutional proposal are also instructive. The species of caste law Bingham evidently wished his Amendment to reach were those, like the Black Codes and the then-constitution of Oregon, that egregiously discriminated against blacks by denying them basic legal protections for person and property, and refusing them the ability to travel and settle freely. These rights and liberties were in Bingham's

[257] Id., at 35.
[258] Id., at 34.

view evidently so elementary that to negate them for any *person*, not to mention entire classes of people, was grossly unjust. This interpretation of Bingham's intentions coheres completely with his later attempts in the Joint Committee to add "due process" and "equal protection" formulations, and his apparent indifference as to whether the "no discrimination … as to civil rights" language survived the Committee's proceedings on the Owens draft. It also gels with Bingham's dictum, delivered during the debate over his proposed Amendment, concerning the "present proud position" of school-segregating New York: his pronouncement indicated that he did not have run-of-the-mill social caste laws in his constitutional crosshairs.

Finally, the change in phrasing from "equal protection in the rights of life, liberty and property" to "equal protection of the laws" suggests two mutually compatible possibilities. The first is that the change arose from Bingham's desire to moderate the language in order to make it more palatable to the Joint Committee and Congress, since the original phrasing had been successfully attacked in the House debate and, independently of its merits, could have been viewed by members of the Committee and Congress as toxic because of its association with a measure that had been tabled and forgotten. That Bingham encountered persistent resistance and setbacks from the Committee in securing this language a permanent place in the Owens draft also suggests that Joint Committee members were reluctant to enshrine language so similar to, and of the same provenance as, the formulation that appeared in the Bingham Amendment. Therefore, one possibility is that Bingham believed the two equal protection formulations were at least roughly synonymous, and rephrased the first primarily to quell fears about its susceptibility to future latitudinarian abuses.

Another possibility is that the "equal protection of the laws" formulation more accurately captured the thrust of the constitutional attack Bingham intended to levy. As we have seen, Bingham probably sought not to eliminate all caste laws, but to secure to blacks certain rights——of

person, property, and movement——that were in Bingham's opinion so fundamental that anyone deprived of them could reasonably described as "exposed," because denied by the state, and consequently without, the "protection of the laws." The Oregon's constitution and laws and the Black Codes of Southern states so abused blacks that blacks could be said to lack the protection of the legal system. Hence, it is possible that the change in phrasing from "equal protection in the rights of life, liberty, and property" to "equal protection of the laws" both afforded, by eliminating the emphasis on rights, less substantive grounds for later Congresses to unduly interfere in state legislation, and articulated a clearer authority for eliminating the most egregious of abuses.

Recall, moreover, the various proposals that the Joint Committee on Reconstruction had considered prior to the adoption of the Bingham Amendment. Article C had been reported for rephrasing to a subcommittee on which Bingham served, and the resulting change in wording was from "[t]he same political rights and privileges" to "the same immunities and also equal political rights and privileges," and from "equal protection" to "full protection." Provided the clauses were not understood to be redundant, the inclusion of a clause commanding "the same immunities and also equal political rights and privileges" and of a clause specifying "full protection" indicates that the subcommittee intended the "protection" language to target something other than political rights, on the one hand, and substantive civil or social rights that might have been subsumed under immunities, on the other. That the language cycled back and forth between "equal protection" and "full protection" also suggests that Bingham, the primary responsible party for the fluctuations, did not intend the final formulation of "equal protection of the laws" in the Fourteenth Amendment to be a constitutional authorization to abrogate all manner of political and social class legislation. Instead, the alternating language, and the synonymy of "full" and "equal" that the language implies, points to the idea that Bingham and the subcommittee sought to require states to extend basic

protections for the civil rights of person, property, and movement to all citizens, *regardless of class*. In the House debate over the Fourteenth Amendment, Bingham would go on to defend Section 1, his handiwork, as follows:

> The necessity for the first section … is one of the lessons that have been taught … by the history of the past four years.... There … remains a want now, in the Constitution … which the proposed amendment will supply…. It is the power in the people … to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State…. [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right … to deny to any freeman the equal protection of the laws or to abridge the privileges and immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy…. [M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws … not only for crimes committed, but for sacred duty done. That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. *That is the extent that it hath, no more*; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land.[259]

[259] Id., at 49-50 [emphasis added].

This extensive soliloquy on the scope and purposes of Section 1 is entirely consistent with the theory that Bingham's understood "equal protection of the laws" to command substantive legal protections for fundamental rights——not those that might in future be added to the list, but those that were deeply embedded in the country's legal tradition, and identified concretely in the Civil Rights Bill, though they had always been violated wherever slavery existed, and were being violated still by state laws like the Black Codes. The whole thrust of Bingham's peroration quoted above is that the part of the phrase "equal protection of the laws" that performs the most work, in Bingham's view, is "*protection*." Bingham apparently intended "equal," like the "full" version with which it alternated in the drafts of what became his eponymous Amendment, to signify comprehensiveness by identifying the respect in which the law's coverage was most often circumscribed: on the basis of class or group identity.

No part of Bingham's remarks on the Section 1 lends credence to Bickel's theory, expressed to Justice Frankfurter in his farewell letter of August 22, 1953 (discussed at greater length below) that "the Congress was on notice that it was enacting vague language of indeterminate reach." To the contrary, Bingham seemed to believe that his equal protection language had a concrete purpose and scope. And that Bingham both spearheaded the attack on the open-ended civil rights phraseology of the Civil Rights Act that culminated in the language's deletion and consistently favored the word "protection" in his Section 1 formulations in lieu of diction that would unequivocally ensure substantive equality of social and political rights most strongly suggests that Bingham's aim in Section 1 was to "constitutionalize" the Civil Rights Act. That "constitutionalization," finally, occurred at two levels: by creating a constitutional authorization for the Civil Rights Act, and by elevating the protections for the rights of person, property, and movement to

constitutional restrictions on the states, while evading the latitudinarian dangers that had been struck from the Civil Rights Act and had sunk the Bingham Amendment.

Thaddeus Stevens also appeared to believe that the language of Section 1 had a concrete purpose and scope, ones that, in Stevens' view, were lamentably inadequate. Recall the proposals Bingham and Stevens had independently submitted to the Joint Committee on Reconstruction prior to the formulation of the Bingham Amendment. Bingham's initial proposal read: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property." Stevens' proposal, in contrast, commanded: "All laws, state and national, shall operate impartially and equally on all persons without regard to race or color." Bingham's language, in other words, was of "equal protection in rights", while Stevens' commanded the "impartial[] and equal[]" "operation" of state and national laws "on all persons without regard to race or color." Thus, at the very least, Stevens probably did not view Bingham's phrasing ("equal protection in [] rights of life, liberty and property") to guarantee that state and national laws "operate impartially and equally on all persons without regard to race or color." Confirmation of this interpretation comes from Stevens' subsequent expression of bitter disappointment with the final text of the Fourteenth Amendment during the House debate.

> In my youth, in my manhood, in my old age, I had fondly dreamed that when any fortunate chance should have broken up for awhile the foundation of our institutions, and released us from obligations the most tyrannical that ever man imposed in the name of freedom, that the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the

> poor, and the superior caste of the rich. In short, that no distinction would be tolerated in this purified Republic but what arose from merit and conduct. This bright dream has vanished "like the baseless fabric of a vision." I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism. Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels….[260]

Stevens' hopes for the liberation of American society from the "vestige of human oppression" and "inequality of rights" were apparently frustrated by the Fourteenth Amendment, but he accepted it, warts and all, evidently because he understood politics was the art of the possible. Stevens' disappointment with the Fourteenth Amendment and his preferred wording for the Bingham Amendment suggest that Stevens believed that Section 1, including the phrase "equal protection of the laws," did not incontrovertibly command or secure the impartial and equal "operat[ion]" of state and national laws "on all persons without regard to race or color."

Now, perhaps an argument will be made that Stevens felt that the language of Section 1 was necessary but not sufficient to achieve the kind of equality he favored, or that he felt that the Amendment's language was not sufficiently unambiguous in commanding the aims he favored, but believed that in the hands of a likeminded judiciary and Congress, the language could be construed to achieve precisely those goals. That may well be, but there is no evidence for it. Stevens' remarks indicate that he believed only the minimum level of equality commanded by the language would be achieved, although he did expressly pin his hopes for greater equality on "future enabling acts or other provisions." As he declared before moving for the House to vote on the proposal that

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[260] Id., at 54-55.

would become the Fourteenth Amendment: "[t]he danger [now] is that before any constitutional guards shall have been adopted Congress will be flooded by rebels and rebel sympathizers. Hence, I say, let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions."[261]

BICKEL'S INTERPRETIVE GLOSS

The interpretative gloss Bickel overlaid on this legislative history in both the memo that Frankfurter distributed to the other justices and the published 1955 Harvard Law Review article is worth examining in some detail. For while it is unlikely that many of the justices carefully studied the 58 pages of legislative history in Bickel's memo, it is very likely that all of the justices read Bickel's executive summary of that history in the six-page "Prefatory Note" prefixed to every copy. The Prefatory Note begins by attempting to situate the Fourteenth Amendment within the electoral context of 1866, though this context was scarcely mentioned in the memo that followed, or in the expanded version that Bickel published in 1955. "It is central to an understanding of the legislative history of the Fourteenth Amendment," Bickel wrote, "that the First session of the 39th Congress met in an election year, that it soon became engaged in a struggle with the President unique in our history, whereby it sought to make a record on which to go to the country against the President."[262] The implication at which Bickel was grasping is clear: there may not be evidence to construe the Fourteenth Amendment the way we know is salutary and just, but that is because its authors were subject to political pressures in the absence of which they might (or would) have

[261] Id., at 55.
[262] Felix Frankfurter Harvard Papers.

used language more amenable to our purposes. "The[] aims [that] defined the Fourteenth Amendment," Bickel continued, "were suffrage or restricted representation for former Confederate States, amnesty or political disabilities for large numbers of Southerners, and the Confederate debt." Other questions were considered, but

> were subsidiary, and there is a striking paucity of allusion to them in the rather hurried debate on the Fourteenth Amendment itself. *It is not insignificant that Charles Sumner [the leading Senate Radical] did not once in the First Session of the 39th Congress speak either to Section 1 of the Fourteenth Amendment or to the Civil Rights Act, which were generally deemed similar in purpose.*[263]

Bickel noted that Bingham, Senate Radical John Howard of Michigan, and Andrew Jackson Rogers all spoke to the meaning of Section 1, the former two in "glowing" terms, the latter only by "attributing some importance to it." "Almost without exception, however," Bickel observed, "the other speakers ignored Section 1, passed it off by remarking on its self-evident justice and on the fact that Congress had previously expressed itself in favor of its purpose by passing the Civil Rights Act, or condemned it on the summary ground that it embodied the Act."

Bickel then pointed out that the Civil Rights Act "secured a series of enumerated rights, not including, in the view of its sponsors and clearly not of the representative body of congressional opinion, so-called political or social rights, or, specifically, the right to sit on juries." Bickel's allusion to the "representative body of congressional opinion" evidently refers to the belief of the Democrats and some conservative Republicans who had aligned themselves with the President that the Act would procure social and political rights for blacks. Why Bickel would include that

[263] Emphasis added.

reference when those who voted for the Civil Rights Act were on the congressional record overwhelmingly rejecting that view of the law[264] will probably become clearer as Bickel's gloss becomes more explicit. However, in the next few lines of the memo, Bickel acknowledged some unhelpful facts for construing the Fourteenth Amendment to mean what his own boss obviously wanted it to: "It is impossible, on the basis of the debates, to conclude that the 39th Congress intended that segregation be abolished. The specific fear that segregation in schools would be abolished was voiced at some length by three leading figures who opposed the Radical leadership and all its works." Still, in light of the fact that two of the vociferous opponents were Democrats of "extreme unreconstructed views" and the third was a Conservative Republican who had "sided with the President" against the Radical Congressional leadership, "[i]t is inescapable that warnings coming from these men were somewhat discounted by their colleagues." Detracting from the authoritativeness of the alarms sounded by these men, whom their colleagues evidently viewed as untrustworthy on the question of the Amendment's meaning, was the fact that "these three almost invariably coupled their warnings concerning school segregation with forebodings in regard to miscegenation and the extension of suffrage to Negroes."

But, Bickel proclaimed, "if anything is clear," it is that the Fourteenth Amendment excluded suffrage for blacks——there was unequivocal legislative history on that question. "As for miscegenation, with all the political pressures and the post-war fervor of the times, it is inconceivable that a two-thirds majority of the 39th Congress would have voted for any measure which it believed would strike down antimiscegenation statutes." This is perhaps the most important concession Bickel made in his writings on the history of the Fourteenth Amendment. For if the 39th

[264] Berger ([1976] 1997, 34-40).

Congress would not have "voted for any measure which it believed would strike down antimiscegenation statutes," then that same body did not understand or intend the Fourteenth Amendment to strike down antimiscegenation statutes now, or at any time in the future. But if that is true, then the 39th Congress did not understand or intend the Fourteenth Amendment to strike down any legislation regulating social equality or inequality. Nor did it, by the incontrovertible record of its proceedings, vote in the Fourteenth Amendment to strike down any classifications pertaining to political rights. Hence, what the 39th Congress did and did alone in proposing the Fourteenth Amendment to the states was to constitutionalize the protections Bingham explicitly identified—–those of rights pertaining to person, property, and movement——and those specified in the Civil Rights Bill. That is, such is what Section 1 of Fourteenth Amendment means if its meaning is determined or exhausted by the legislative history.

However, Bickel refrained from extending the implications of his observation about the attitude of the 39th Congress toward miscegenation laws. Instead, he continued on to report that the most ardent abolitionists and Radicals, including Thaddeus Stevens, were disappointed in the limitations of the Fourteenth Amendment. Consequently, "[t]he majority of the 39th Congress knew that the fullness of the abolitionist program was unfulfilled and the direst of the opposition's fears unfounded." Of course, if it did not, it would not——could not, per Bickel's own analysis of the congressional record——have adopted the Amendment. Bickel also recounted that Bingham was the author of Section 1 and of the successful attack on overly latitudinarian language in the Civil Rights Act, for both substantive (policy) and constitutional (legal) reasons. Furthermore, Bickel highlighted that Bingham had "thought the civil rights to be safeguarded must be specified" when constitutional language protecting civil rights generally had been proposed in the Joint Committee on Reconstruction and that Bingham's "persistent effort in the Committee was to avoid the

use of a general 'civil rights' provision, at least one standing alone." Finally, Bickel summarized the evidence he had surveyed in his letter up to this point.

> It is thus reasonably clear what the majority in the 39th Congress did not have specifically in mind. It is also clear that there were a number of existing practices in the South (and in some Northern States as well) which it was generally thought the Civil Rights Act, and hence the Fourteenth Amendment, would strike down. Among them were restriction on movement, on ownership of property and on professional activities, and deprivation of procedural rights in court. Such practices were generally codified in Southern Black Codes.

Though Bickel stated that "it is thus reasonably clear what the majority in the 39th Congress did not have specifically in mind," he refrained from attempting to explain the implications of those deliberate omissions for the likelihood that the 39th Congress might have targeted in the Fourteenth Amendment subjects not at all or only infrequently contemplated, such as school segregation. Bickel's observations in other areas (especially his comment regarding the 39th Congress' attitudes toward miscegenation, discussed above) tend strongly to minimize this likelihood, a fact which suggests his reason for not examining it. Moreover, the ills Bickel did identify as falling squarely within the scope of the legislative action that Congress sought to proscribe in Section 1 are those Bingham repeatedly emphasized as the targets of the Civil Rights Act and his own eponymous Amendment. Why Bickel did not proceed candidly if unenthusiastically to the terminus of his train of reasoning——i.e., to the conclusion that Bingham's intentions for and understanding of Section 1 were dispositive of its meaning——is demonstrated by the thought Bickel expressed in the Prefatory Note's conclusion, discussed below.

Next, in weakly trying to adduce support for the proposition that his inquiry into the proceedings of the 39th Congress might provide grounds for overriding *Plessy*, Bickel inadvertently highlighted *Plessy*'s sound historical footing.

> It may also be suggested, on the basis of a few remarks——one by a moderate Republican in the House, another by a Radical in the Senate … ——that there was some opinion holding that if Negroes were taxed toward school funds, some sort of adequate, though segregated, school system would have to be provided for them from those funds. Finally, it was fairly common ground in Congress, and very likely throughout the North, that the mass of people whom the Thirteenth Amendment had freed would have somehow to be educated, "elevated," if any sort of viable society were to be erected with them in its midst…. It may well have been thought that the Fourteenth Amendment might impose some obligation in this respect, at least on States which provided educational facilities for white children. But this is little more than conjecture.

With respect to the framers' *only direct consideration of segregated education* during the congressional debates over the Fourteenth Amendment, the most Bickel could say is that some members of the 39th Congress expressed views of the Amendment's purpose entirely consonant with *Plessy*'s rule of "separate but equal."

Bickel then proceeded to deliver the final, parting thought of his Prefatory Note. It is here that he dispensed with any vestigial pretense of scholarly disinterestedness and stated what he evidently wished the justices to take away from his historical inquiry: whatever unhelpful facts the history of the Fourteenth Amendment contains, that history "invites" the Court to proceed down whatever path it concludes is just.

> To arrive at the only two relative certainties thus disclosed——once concerning the matters which, in the 39th Congress, were generally thought to be without, the other concerning those which were thought to be within, the scope of the Fourteenth Amendment——is not to have concluded the necessary inquiry into the legislative history of the Amendment. For it gives that history a much more conclusive appearance than its comprehensiveness warrants. The 39th Congress was on notice that it was enacting vague language of essentially indeterminate reach. No one——least of all Mr. Bingham——knew precisely what Section 1 meant…. [I]n the rush and under the political pressures of the final days, the 39th Congress, believing it was meeting some immediate needs now and others not yet or not at all, acted as other Congresses acted before and since; it left for the future the solution of a number of painful problems. It cannot be said that it knew what role the language it was enacting should or would play in that solution.

Here Bickel implied that being on notice of X is equivalent to having a conscious purpose to allow or pursue X. With this rationalization Bickel apparently sought to relieve himself of the normal burden of historical proof in judicial inquiry, which would be to establish that a provision's architects had adhered to a particular point of view or plan of action that the judiciary shares. Bickel instead attempted to shift the burden of proof to those who believed that the Amendment's legislative history provided no affirmative warrant for construing the Amendment to outlaw segregation to show that that lack of evidence was an insurmountable obstacle to interpreting the Amendment to ban precisely what was never explicitly targeted. More generally, Bickel charged those who construe the Amendment's legislative history to be amenable to segregation with the responsibility of proving that the framers did not expressly disavow future latitudinarian constructions of their

handiwork. Thus, despite the fact that Bickel's own research showed conclusively that Section 1 of the Fourteenth Amendment——"like section I of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation,"[265] i.e., social and political rights——Bickel argued that the Supreme Court could interpret the Amendment not just more liberally than its framers intended, but also to *include precisely those things its framers explicitly disclaimed*. The Court could do so, he reasoned, because the Amendment's framers did not explicitly say that they did not think that the Court in the future should not be able to interpret the Amendment to target precisely what they did not want it to target, in a way entirely at odds with their understanding of the purpose and reach of their own handiwork.

In this way, Bickel discounted completely the results of his own historical inquiry, while purporting to claim that they——in the guise of the burden-shifting interpretative narrative he had helpfully weaved——were still of some use to the justices. Bickel's is an egregious case of transparently motivated historical interpretation. Not only does "A being on notice of X" emphatically *not* prove that A desired and intended that X should issue from its efforts, but also, as Bickel himself noted and was no doubt keenly aware, Congress chose the Amendment's equal protection wording in part because it wished to avoid language with a "latitudinarian" bent.[266] Moreover, against Bickel's claim that "least of all Mr. Bingham … knew precisely what Section 1 meant," Bingham's remarks throughout the debates of the 39th Congress and the record of his votes on the Joint Committee indicated that he had a reasonably concrete idea of what Section 1 meant. As we have seen, Bingham, like most of the other members of the 39th Congress, was mindful of language

[265] Bickel (1955, 58).
[266] Ibid.

that might lend itself to future distortions and sought to avoid it. Finally, Bickel's argument that Congress did not know what role the Fourteenth Amendment would play in the solution of future problems is true, just as it is true that one does now know precisely what will happen next year or even tomorrow, but that fact does not compel the conclusion Bickel imputed to it: that the 39th Congress acquiesced to or intended for the Amendment to be interpreted in the future in a way that that that Congress specifically and explicitly disclaimed, to solve problems that were themselves alive and well in 1866.

Bickel evidently attempted to palliate this shortcoming of his Prefatory Note's interpretative gloss by introducing in his Harvard Law Review article the following contention. Whether or not Congress anticipated that its constitutional provision might be used in a way it would not have itself approved, it should have known better. The 39th Congress, Bickel argues, "cannot be said [to have known] what role the language it was enacting should or would play in future endeavors," and since "[t]he tradition of a broadly worded organic law not frequently or lightly amended was well-established by 1866 … it cannot be assumed that [the 39th Congress] or anyone else expected or wished the future role of the Constitution in the scheme of American government to differ from the past."[267] The biggest problem with this suggestion is that it implies that "the future role of the Constitution in the scheme of American government" was the same in 1866 as it would become in the Twentieth Century, during the first half of which the Supreme Court acquired a far more central role in American politics and political culture than it had possessed in the first 112 years of the polity's history. Indeed, as late as 1920 it was an extremely controversial proposition in American political culture that major expansions or reconceptions of constitutional rights could legitimately

[267] Id., at 59.

transpire by means of judicial decision alone: the pervasiveness of that orientation toward revolutionary judicial action explains, for example, the passage of the Nineteenth Amendment in lieu of a judicial decree extending suffrage to women, and the widespread contempt in which *Lochner*-era jurisprudence was held. There is, furthermore, every reason to think that the framers of the Fourteenth Amendment either distrusted or ignored judicial power: the Court's recent and most significant political intervention (as of 1866) in American political life, *Dredd Scott v. Sandford*,[268] destabilized the country and precipitated civil war.[269] Perhaps this distrust or disregard of the judiciary was most evident in Section 5 of the Fourteenth Amendment, which afforded Congress alone explicit enforcement power. Therefore, to ascribe to the 39th Congress the purpose of adopting language that could be liberally reinterpreted by future generations (including future judicial generations) to solve future problems, by asserting that "Congress was on notice" that the language it chose was "indeterminate," simply belies every indication in the historical record.

Bickel had still more rationalizations to present. In light of his uncorroborated conclusion that the 39th Congress would not have "wished the future role of the Constitution in the scheme of American government to differ from the past," Bickel asked: "Should not the search for congressional purpose, therefore, properly be twofold? One inquiry should be directed at the congressional understanding of the immediate effect of the enactment on conditions then present. Another should aim to discover what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence."[270] Evidently finding the legislative history of

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[268] 60 U.S. 393 (1857).

[269] In fairness to Bickel, he acknowledged the likelihood that the 39th Congress was wary of an interventionist Court at the end of the Harvard Law Review version of his memo, although he presented this point as tangential and declined to draw any inferences from it for understanding the 39th Congress' attitude toward the 14th Amendment. Id., at 64.

[270] Id., at 59.

the Fourteenth Amendment depressingly unhelpful, Bickel thus tried to limit the implications of the history's concrete facts for the judicial interpretation of the Fourteenth Amendment some 87 years after its adoption. After all, little had been discovered in the inquiry to support the claim, central to a "judicial" case for overturning *Plessy* in 1954, that the Amendment had been understood by its framers to invalidate social caste legislation. Therefore, the further removed the level of judicial analysis could be rendered from the history's unhelpful facts, the more persuasive would be the inevitable determination that the "long-run" effect of the Amendment was salutary after all. Bickel attempted to discern that long-term effect by circumscribing the intentions of the 39th Congress, which were entirely consistent with tolerating or permitting racial discrimination in social and political rights, to the "short term."

Bickel was correct to say, as he did in the Harvard Law Review version of his memo,[271] that uncertainty over the meaning of constitutional provisions tends to invite future generations to apply their own interpretive gloss, as he had done himself. But the reality of the invitation and the legitimacy of the gloss are logically unconnected. To be legitimate, the gloss must issue from an invitation that is deliberately and explicitly extended. My leaving open the door of my house may very well invite passersby to enter and abscond with my possessions, but it does not thereby legitimate the taking. Similarly, the uncertainty of some members of the 39th Congress concerning the precise meaning or reach of the equal protection clause of the Fourteenth Amendment might well invite, but does not thereby legitimate, that species of future interpretation that the majority explicitly anticipated and attempted to forestall by eliminating language that they concluded might be susceptible to "latitudinarian" distortions. That the vast majority of the 39th Congress failed to conclude that Bingham's Section 1 "equal protection of the laws" formulation would in future be

[271] Id., at 65.

susceptible of precisely those kinds of unintended constructions was probably due to the fact that Section 1 was widely represented and understood——by opponents and proponents of the Amendment alike[272]——as "constitutionalizing" the Civil Rights Act in the two ways previously discussed.[273] This would account, as Bickel acknowledged repeatedly, for the relative neglect Section 1 experienced, and for the overwhelming focus on Section 3, in congressional debate on the Amendment.[274] However, Bickel's claim——amounting to an argument from silence——that the members of the 39th Congress never manifested any desire that future generations *not* substitute their superior moral opinions for Congress' handiwork of 1866 (in the words of Raoul Berger) "assumes what needs to be proved"[275]: that the Amendment's framers deliberately exercised (now in Bickel's words) "a choice of language capable of growth."[276] The reading of the evidence Bickel's own memo presents contradicts that conclusion.

Bickel expressed himself on this point in a slightly different way to Justice Frankfurter in an August 22, 1953 missive that served as both farewell letter to the justice and executive summary of his memo on the history of the Fourteenth Amendment.

> But all this [synopsis of the Amendment's legislative history] only means that the legislative history is inconclusive. *For the Congress was on notice that it was enacting vague language of indeterminate reach.* I think, though it is hard to quote chapter and verse on

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[272] Id., at 54; Berger ([1976] 1997, 32-33).

[273] Or, in Raoul Berger's more elegant summation: "the Amendment was designed to '*constitutionalize*' the [Civil Rights] Act, that is, to 'embody' it in the Constitution so as to remove doubt as to its constitutionality and to place it beyond the power of a later Congress to repeal" (Berger [1976] 1997, 32-33).

[274] See Bickel (1955) at 48 ("But the bulk of the debate turned on other sections, principally section 3. A number of the Republicans who spoke failed even to mention section 1."), at 50 (recounting the separate speeches of Bingham and Stevens in the House, which devoted considerable time to Section 3), and at 58 ("For the rest, however, section i was not really debated. Rogers, whose remarks are always subject to heavy discount, considering his shaky position in the affections of his own party colleagues, raised 'latitudinarian' alarms. One or two other Democrats in the House did so also. But more and more, debate turned on section 3 and not much else.")

[275] Id., at 124.

[276] Bickel (1955, 63).

> this, that many, very many men in that Congress, not least of all Thaddeus Stevens, thought that the amendment would operate principally through implementation legislation by Congress. Hopes both for a broad and a narrow application of the general language being voted were met by this impression. Otherwise the 39th Congress saw the issues of its day, among which one [eliminating the Southern Black Codes] overshadowed the rest, and trusted to the future to solve future problems. It pointed, I think, in Section 1 of the Fourteenth Amendment to the general manner in which problems similar to those with which it was dealing should in future be solved. This I believe is the most that can be said, and it is supported it seems to me by the authority of this Court which has extended the solution of the Fourteenth Amendment to problems -- notably jury service[277] -- which were as little in focus in 1866 as segregation, and concerning which an even better case can be made out to show that the 39th Congress affirmatively indicated that they were without the scope of the Amendment it was promising. I think the legislative history leaves this Court free to remember that it is a Constitution it is construing. I think also that a charitable view of the sloppy draftsmen of the Fourteenth Amendment would ascribe to them the knowledge that it was a Constitution they were writing.[278]

Far from the elegant and soaring pronouncements on constitutionalism that Bickel obviously intended these last sentences to comprise, they provide more corroboration that Bickel was motivated by a desire to reach the "moral" or "just" conclusion that his research assignment into the

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[277] *Strauder v. West Virginia*, 100 U.S. 303 (1880). Whether Bickel's comment in the letter to Frankfurter had any ultimate influence on Warren's use of *Strauder* in *Brown* is unknown, but it is more likely that Warren, who admitted at the 1953 conference to having "studied" the litigants' briefs, simply lifted the precedent, and the NAACP's theory of what it signified for interpreting the Fourteenth Amendment, from the 1952 NAACP brief (Brief for Appellants) in *Brown*. In any case, *Strauder* was certainly the strongest judicial precedent for *Brown* prior to *Sweatt* and *McLaurin*.

[278] Felix Frankfurter Harvard Law School Papers (emphasis added).

Amendment's history had rather conspicuously failed to supply. Twenty-five years after *Brown*, Philip Kurland, Bickel's predecessor in Frankfurter's chambers, remarked rather caustically that Marshall's dictum in *McCulloch* that

> "[W]e must never forget. . . it is a constitution we are expounding" [] transmuted the Necessary and Proper Clause of Article I into a Hamiltonian grant of unlimited authority to the national government. Felix Frankfurter, near the end of his judicial career, asserted that this statement by Marshall was "the single most important utterance in the literature of constitutional law - most important because most comprehensive and most comprehending." I suppose that my apprenticeship to Justice Frankfurter was a failure. For these words, "we must never forget it is a constitution we are expounding," are as empty of meaning for me as they were full of significance for Mr. Justice Frankfurter, unless these words mean what Charles Evans Hughes meant when he said: "The Constitution is what the Justices say it is."[279]

Such, certainly, was the effect, if not the intent, of the interpretive gloss Bickel applied to the Amendment's legislative history in his farewell letter to Justice Frankfurter.

In his account of the legislative history of the Fourteenth Amendment, Bickel employs a modus operandi of (1) acknowledging facts unhelpful to the prospect of overturning segregation, (2) studiously refraining from identifying and expounding upon those facts' rather obvious implications for the judicial concerns that animated his research assignment, and (3) drawing implications from silence or a lack of facts. Bickel apparently initially sought historical facts that would free his boss, Justice Frankfurter, from the handcuffs of the justice's own jurisprudential approach, but when those facts failed to materialize in the inquiry, Bickel settled for an interpretive gloss that

[279] Kurland (1979b, 310).

he evidently hoped would permit his boss to reach the conclusion both Frankfurter and Bickel favored, jurisprudential shackles notwithstanding. Accordingly, Bickel's argument was strongest when he moved farthest away from the historical facts, confirming the impression that his interpretive gloss, and not the historical evidence it putatively synthesized and embodied, was doing the heavy lifting of convincing the reader that "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866."[280]

Rather than illustrating any unhelpful implications of the uncertainty around the Amendment's precise meaning——e.g., that though it was unclear precisely what the Amendment required, those members of the 39th Congress who supported it would have almost certainly all voted it down if they thought it could have been interpreted to require, e.g., desegregation——Bickel repeatedly suggested in both unpublished and published versions of his memo that that uncertainty manifested a legislative intent that future generations construe the language however they prefer. As we have seen, however, Bickel failed to provide any evidence that any member of the 39th Congress believed or said that, or anything close to it. Presumably, members of the 39th Congress like Bingham would have thought it a manifest violation of the Amendment for future generations to interpret laws depriving people of the right to travel freely to be compatible with the imperative that "No state shall … deny to any person … the equal protection of the laws." (Though we cannot ask Bickel for a response, it seems unlikely that he would have denied this.) So too, then, might most of the members of the 39th Congress have felt that future generations' interpreting the equal protection clause to invalidate state anti-miscegenation laws would manifestly contradict the

[280] Bickel (1955, 65).

Amendment's meaning. "Did no one bother to read the legislative history?" they might ask. Bickel did, and reached the conclusion he set out to in the first place.

Thus, baked into Bickel's analysis is an unstated premise concerning constitutional interpretation itself. That premise is simply an analog of Tocqueville's observation that "Equality is a providential fact."[281] In the form Bickel deployed it, the premise is that the interpretations of future generations are bound in one direction only. The intentions and understandings of the framers of a constitutional provision are relevant only insofar as they establish a floor; the ceiling, however, is at the discretion of future generations. This premise was not in any way expressed or legitimated during the 39th Congress: it is Bickel's own import, if not his own manufacture. If the legislative history of a constitutional provision is to be consulted it all, it must be to establish, as far as possible, the precise intentions of its framers. If those intentions are disregarded, then all that is left to take its place and assume the mantle and authority of History are the motives and desires of the consultant, whose views are only too easy to project into the void. That, I believe, is what happened in Bickel's no doubt well-intended account of the genesis of the Fourteenth Amendment.

[281] Cf. fn 76, *supra*.

Chapter 6. Felix Frankfurter

Of the nine justices who eventually voted in *Brown*, Frankfurter exhibited by far the strongest evidence of intuitive decision-making, struggling palpably over the course of more than two years to reach a constitutional outcome in the segregation cases that his conscience could abide. Frankfurter harbored a powerful personal preference for ending segregation, but also subscribed to a particular judicial approach that, given only the evidence presented at the *Brown* hearings, precluded ending segregation on a basis that would, in the justice's view, qualify as adequately "judicial." Frankfurter only overcame his long impasse by finally convincing himself, in the month between the second *Brown* conference on December 12, 1953, and January 15, 1954, that "[t]he effect of changes in men's feelings for what is right and just" is dispositive (though here he had used the words "equally relevant") "in determining whether a discrimination denies the equal protection of the laws."

At the first *Brown* conference, on December 13, 1952, Frankfurter began by addressing the D.C. case. Following on Reed's concluding remark that the senior justice would vote to "uphold separate & equal", Frankfurter contended that "D.C. case raises different questions" than the state cases. The justice declared: "I am prepared today to vote that segregation in D.C. does violate Due Process."[282] Autobiographically, Frankfurter commented that he "has never had close living relations to Negroes but much to do with the problem–was asst counsel to NAACP also belong to the Jewish minority." Whatever the relevance of these details to his constitutional analysis, Frankfurter then proclaimed that it was "*Intolerable* that Gov. should permit *seg. in DC life* but deprecates

[282] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

needless *force* in changing this." Next, he exhorted the Court to "hold [over] all cases" for reargu-ments. In these rehearings, Frankfurter suggested, the justices could "[a]sk counsel to demonstrate what it is that justifies saying it [segregation] is wrong."[283] Then, perceiving the possibility of cooperation from the executive branch, Frankfurter remarked that "The social gains of having them accomplished with executive sanction would be enormous." "As to states," the justice continued, "can't take questions as sociological. How do we know what the framers of the Amendment meant? You can't fairly say, 'yes, these fellars meant to abolish segregation' or vice versa." Frank-furter then neatly expressed what for him turned out to be the central obstacle in deciding *Brown* in accordance with his conscience: "What justifies us in saying that what *was* equal in 1868 is not equal now?" Apparently as a result of his inability to satisfactorily answer these questions, Frank-furter reiterated that it was "highly desirable to set down cases for reargument, say 1st March."[284]

Douglas records Frankfurter's statements at the first *Brown* conference slightly differently. Douglas noted that Frankfurter's comments with respect to the state cases led off with a request that the Court "ask counsel on reargument to address themselves to problems of enforcement" in both cases." Then, Frankfurter apparently took a swipe at Black's certainty (detailed in Chapter 4, above) about the meaning of the Fourteenth Amendment: "how does Black know the purpose of the 14th Amendment?" Frankfurter declared that "he has read all of [the Amendment's] history and he can't say it meant to abolish segregation." Douglas also records Frankfurter's willingness, as of that date, to "reverse" the Kansas District Court, which had heard the titular *Brown* case, "on the finding of the trial court – equal protection does not mean what was equal but what is equal."

[283] Kluger ([1976] 2004, 604).
[284] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

Finally, Douglas' record of Frankfurter's concluding comments evinces Frankfurter's deep ambivalence at that time about the constitutional questions at stake in *Brown*. Frankfurter, Douglas noted, "wants to know why what has gone before is wrong——he can't say it's unconstitutional to treat a negro differently than a white——but he would put all the cases down for reargument."[285]

Douglas also captured several helpful details concerning Frankfurter's comments on the federal segregation case, *Bolling*. Douglas wrote that Frankfurter "does not agree with Black that states are more limited – he thinks segregation in the nation's capital violates the due process clause." Frankfurter adduced evidence for this position by "refer[ring] to the experience of colored people here [in D.C.] especially Coleman, one of his old law clerks." William T. Coleman, the first black Supreme Court law clerk, had worked for Frankfurter during the Court's 1948 October term. During his time as a Frankfurter clerk, Coleman regularly struggled to "find a restaurant in the capital that would allow him and his fellow clerks, all white — including Elliot Richardson, a future United States attorney general — to have lunch together."[286] As immersed as he was in the lives of his clerks, Frankfurter was no doubt well aware of the routine humiliations Coleman must have experienced under segregation. Finally, Frankfurter contended that reargument was desirable in order to acquire a sense of the incoming Eisenhower administration's position on and level of commitment to desegregation. "[I]t is a gain in law administration," Douglas records Frankfurter as saying, if the Supreme Court's command to desegregate "comes not as a pronouncement of coercive law but with the help of the new administration that has promised to change the law here in the District."

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[285] William O. Douglas Papers. Box 1150. Library of Congress.

[286] Hevesi, Dennis. "William T. Coleman Jr., Who Broke Racial Barriers in Court and Cabinet, Dies at 96," *The New York Times*, March 31, 2017. Available at https://www.nytimes.com/2017/03/31/us/politics/william-coleman-jr-dies.html. Accessed on October 25, 2017.

Though in the summer of 1953 Frankfurter had succeeded in his singlehanded campaign to persuade the Court to order reargument in *Brown*, on December 12, 1953, the date of the second *Brown* conference, the justice had still not resolved his internal tension over segregation in the state cases. He opened at that conference by reiterating his view that neither the text nor the legislative history of the Fourteenth Amendment provided a compelling basis for invalidating segregation on equal protection grounds. Douglas records Frankfurter as remarking that "due process and equal protection in 14th amendment certainly did not abolish segregation when it was adopted." Furthermore, Frankfurter stated, the "most the history shows [is] that the matter was unconclusive [sic]." Finally, "history in Congress and in this court indicates that Plessy is right."[287] What bothered Frankfurter in particular was the behavior of the 39th Congress, which adopted both the Amendment and "a host of legislation . . . presuppos[ing] that segregation is still valid." Then there was the obstacle of precedent, or the "history … in this [C]ourt [which] indicated that *Plessy* is right."[288] So even after the reargruments that Frankfurter had fought so hard to achieve, apparently as a means to resolving his own judicial impasse, the justice was back where he had started: stuck between the rock of unhelpful legislative history and the hard place of unfavorable precedent.

The first puzzle that emerges from Frankfurter's remarks is the contradiction posed by the justice's apparent certainty that the Due Process Clause of the Fifth Amendment prohibits Congress from requiring segregation, and his ambivalence that the Fourteenth Amendment requires the same of the states. In the 1952 conference, Frankfurter unequivocally declared that segregation violates due process and is therefore proscribed by the Fifth Amendment. Yet, when it came time for him to pronounce on the meaning of the Fourteenth Amendment, which like the Fifth contains

[287] William O. Douglas Papers. Box 1150. Library of Congress.
[288] Hockett (2013, 76).

a Due Process Clause, Frankfurter could not bring himself to say the former proscribed segregation. He was in the same position, a year later, at the second *Brown* conference, when he emphasized that history and discernible legislative intent were the sole justifications for judicial action. But if segregation violates due process, then both the Fifth and Fourteenth Amendments would presumably proscribe it. Why then, for Frankfurter, does the Due Process Clause of the Fifth self-evidently ban segregation while the Due Process Clause of the Fourteenth require recourse to history and legislative intent? This logical puzzle can be satisfactorily reconciled, I believe, by the following observations.

Frankfurter's diction and reasoning about the constitutional warrants for his conclusion imply that the justice did not reason his way from the text of the Fifth Amendment and an analysis of segregation to the conclusion that the latter offended due process. The justice employed openly instrumental language in announcing his position on Congressionally-authorized segregation: it is "*Intolerable* that Gov. should permit *seg. in DC life*." The unqualified use of the word "intolerable" suggests the statement describes Frankfurter's personal sentiments. Moreover, it appears in the context of his remarks as a reason——indeed, the only reason he explicitly adduces——for his conclusion that segregation runs afoul of due process.[289] Additionally, Frankfurter's use of the English subjunctive ("would permit" in Clark's notes; "should permit" in Burton's) lends additional weight to the surmise that the justice's position was determined by a profound personal reaction to an eliciting stimulus: the subjunctive affords him some distance on actions he obviously considers morally reprehensible. Thus, the federal government's endorsement and perpetuation of an immoral and backwards policy was profoundly offensive to Frankfurter and most likely elicited a

[289] Clark records Frankfurter as saying, "I am prepared today to vote that segregation in D.C. does violate due process. Intolerable that D.C. would permit segregation."

powerful reaction, which Frankfurter attempted to articulate to his brethren in judicial terms ("segregation does violate due process") while belying his constitutional "conclusion" in pointing to an essentially personal reason for having reached it.

The force of this reaction was sufficient to overcome Frankfurter's usual judicial approach to hard questions, that is, examining an enactment's history and the intent of its framers. In light of Frankfurter's apparent view that the history of the Fourteenth Amendment was essential to (if not dispositive of) the Amendment's meaning with respect to segregation, that the justice eschewed any analogous inquiries into the history of the Fifth Amendment demonstrates that he did not subscribe unqualifiedly to his claim that segregation violates due process: if segregation violates due process, then both the Fifth and Fourteenth Amendments proscribe it by the plain letter of their Due Process Clauses. Thus, Frankfurter's use of openly instrumental language combined with the logical inconsistency of his treatment of the two Amendments containing due process guarantees strongly suggests that the justice was so offended by the prospect of the national government enforcing segregation, that his decision in the DC case was "short-circuited" in favor of his personal policy preference.

The likely source of that powerful personal reaction, Douglas' notes suggest, was Frankfurter's personal investment in a victim of D.C.'s segregationist policies: his law clerk William Coleman. Frankfurter apparently thought highly of and cared deeply about Coleman. Of their relationship, Kluger reports, "[w]hen Coleman left Frankfurter's service, the Justice wrote him, 'What I can say of you with great confidence is what was Justice Holmes's ultimate praise of a man: "I bet on him." I bet on you, whatever choice you may make and whatever the Fates may have in store for you.'"[290] When Coleman worked for him in 1948 and 1949, Frankfurter witnessed

[290] Kluger ([1976], 2004, 292-293).

the routine humiliations to which segregation subjected blacks. In 2005, Coleman would recount one such instance to an interviewer.

> I remember there was one day when we were working and the Court was not open but the justices were working. It was one of those semi-holidays... And I was working on an anti-trust case with Justice Frankfurter and Elliot [Richardson, Frankfurter's other clerk] stuck his head in the door and said, "The law clerks have decided to go down to the Mayflower [Hotel] for lunch," and I said, "Well, give me ten minutes and I will join you." So, when I came out 10 minutes later, Elliot said, "Oh gee, it's kind of late, let's go down to the Union Station." And I went [to Union Station] just thinking, that you know, we were late. I then got back to the office and I noticed that the justice had tears in his eyes. Why? Because Elliot had told him the story that he had called the Mayflower and the Mayflower had said, "Well, we can't take a black," and so Frankfurter certainly felt very offended.[291]

If this anecdote is representative, then it is very likely Justice Frankfurter was embarrassed and wounded by the gratuitous humiliations that segregation inflicted upon Coleman. In psychological terms, Frankfurter likely experienced intuitions of shame and indignation when contemplating the injustice of his clerk's treatment in D.C. The justice's visceral negative reaction to Coleman's mistreatment was so powerful, it would seem, that that reaction impelled him to conclude that segregation was unconstitutional without recurring to any species of conscious deduction. In other words, the sufficient condition of Frankfurter's determination that segregation in D.C. violated due process was the magnitude or acuteness of the indignation it induced in him, and his judgment of unconstitutionality required no inputs from formal judicial reasoning. Thus, Frankfurter's visceral

[291] "William T. Coleman (2005) on Felix Frankfurter." Robert H. Jackson Center. https://www.youtube.com/watch?v=8K8cM3pYPp8. Accessed October 29, 2017.

intuitive reaction to the injustice of segregation in D.C., a reaction that occurred only because he had a *personal* stake in one of its victims, precluded him from even beginning to judicially analyze that species of segregation and formed the necessary and sufficient condition of his confident determination that it violated due process.

At the same time, the justice apparently lacked an analogous personal investment in any victim of segregation practiced by the states. Recall Frankfurter's acknowledgment at the 1952 conference, as recorded by Justice Burton and reported by Kluger, that the justice "has never had close living relations to Negroes but much to do with the problem–was asst counsel to NAACP also belong to the Jewish minority." Thus, with respect to state segregation, Frankfurter was probably bereft of the intuitions that compelled him to conclude that segregation in D.C. was unjust. So even though the two forms of segregation entailed precisely the same social and legal consequences for blacks, what accounted for Frankfurter's straightforward and analysis-free determinations that segregation in D.C. "violates due process" but that segregation in the states needed to be further examined were the different intuitions Frankfurter experienced: the first a function of his personal experience of the injustice to which his clerk was subjected in D.C. and the second a function of the absence of personal exposure to the injustice of state segregation. The upshot is that Frankfurter's lack of intuitions of indignation and shame regarding segregation in the states allowed him to subject that species of segregation to judicial scrutiny instead of declaring it illegitimate from the beginning.

Now, it should be acknowledged that the above account is speculative, and that there is no direct evidence for its claims about Frankfurter's intuitions. But the interpretation reconciles and synthesizes the available evidence more credibly than could, for example, the rationalist model of moral decision-making. The rational model predicts that once Frankfurter had determined that

segregation in D.C. violated the due process clause of the Fifth Amendment, he would apply precisely the same logical rule to segregation in the states and conclude that state segregation violated the due process clause of the Fourteenth Amendment. Since, as we have just seen, Frankfurter did not in fact do this, it would then behoove the rationalist to posit the presence of a distinguishing principle to account for the justice's position on the differential constitutionality of the two species of segregation. But none is available: certainly, originalism and textualism could not supply the necessary distinction between the two Amendments. So this speculative account is nonetheless highly credible because it accounts for all of the available evidence and coheres with contemporary observations of how people actually engage in moral decision-making, that is, by relying on intuitions elicited by the phenomenon that forms the object of judgment.

Though Frankfurter was almost certainly deeply offended by the treatment to which D.C. segregation subjected William Coleman, the justice possessed a strong, prior personal preference for desegregation. Most of the existing *Brown* scholarship agrees on this. For example, Hockett, who tends to discount attitudinalism in the behavior of Warren, Black, Clark, Burton, and Minton, concedes Michael Klarman's contention that Frankfurter's background strongly suggests that the justice held strongly egalitarian racial views. For example, not only had Frankfurter hired the Court's first clerk, but prior to his appointment to the Court, the justice had been a member of the NAACP's National Legal Committee.[292] Kluger also acknowledges Frankfurter's egalitarian credentials. Philip Elman, an Assistant Solicitor General, former Frankfurter clerk, and decades-long Frankfurter friend and confidant, recounted to Kluger that Frankfurter "used to talk to me about the segregation question a good deal. He personally was deeply against it, but his first concern was

[292] Hockett (2013, 44).

the Court, and he had a fear the whole thing was moving along too fast."[293] Coleman, interviewed by Kluger, similarly commented: "From the day these [*Segregation*] cases were taken, it was clear how [Frankfurter] was going to vote. Now it may be true that he felt if there had been any honorable way of delaying it *now*, then maybe the Court should do that. But I know for a fact——well, let's not say 'fact'——that he was for ending segregation from the start."[294]

Thus, in part due to his strongly egalitarian personal proclivities, in part to his personal relationship with Coleman (and perhaps other similarly situated blacks), and in part due to his recognition that the Court's confrontation with segregation exposed it to profound institutional risks, Frankfurter was to an unusual degree emotionally bound up in the disposition of the *Segregation Cases*. Upon the death of Chief Justice Vinson in September 1954, for instance, the justice famously quipped to Elman that "this is the first indication I have ever had that there is a God."[295] Frankfurter certainly wished to have the *Segregation Cases* decided unanimously——an outcome that Vinson's listless and inept leadership of the Court threatened——and in a manner that minimized damage to the Court's reputation and power. But this comment, I believe, also evinces the magnitude of the moral question Frankfurter believed was at stake. In a letter that he composed to Justice Reed three days after *Brown I* was handed down, Frankfurter thanked his colleague for ultimately changing his position on the constitutionality of segregation in order to join the other eight justices and make a unanimous Court. "I am not unaware of the hard struggle this involved in the conscience of your mind," Frankfurter wrote. "I am not unaware because all I have to do is look within. As a citizen of the Republic, even more than as a colleague, I feel deep gratitude for

[293] Kluger ([1976] 2004, 603).
[294] Id., at 604.
[295] Id., at 659.

your share in what I believe to be a great good for our nation."[296] It is possible, but exceedingly unlikely, that Frankfurter would have expressed gratitude to a colleague for joining the Court against his "first choice" constitutional position, to describe the *Brown* outcome as "a great good for our nation," and to see, for the first time in his life, the benign hand of providence in securing that unanimous resolution, if Frankfurter did not believe that segregation was profoundly unjust, independent of the judicial basis for invalidating it.

While Frankfurter summarily dispatched the federal segregation case by an instantaneous, intuition-laden recourse to due process, his subsequent ambivalence about the meaning of the Fourteenth Amendment and its consequences for the state cases can, I believe, be understood as the result of felt constraints imposed by the justice's intellectual temperament and judicial philosophy. Frankfurter was a judge's judge. His identity, first as a professor of law, and later as a jurist, comprised the core of his self-conception. In both of his careers, he felt consciously duty-bound to engage in judicial, as opposed to personal or moral, inquiry and reasoning, to a degree perhaps matched only by his predecessors, judicial archetypes, and mentors Oliver Wendell Holmes and Louis Brandeis. As Frankfurter once wrote to Justice Black, "I 'have a romantic belief in Reason.'" Or, as he commented to Justice Jackson: "You see, my dear Bob, one drawback of a professor is that he does believe in reason and profoundly believes that the mode by which results are reached are important——maybe more important——in the evolution of society as the result itself. . . . But no sooner have I said that than I am wondering whether I do not claim too much for professors!"[297]

[296] Id., at 712.
[297] Schwartz (1983, 40).

Be that as it may, Frankfurter did not claim too much for himself. As Justice Reed once complimented him, "One thing you always do, better than most of us, [is] vote your view of the law, without direction from your own wishes."[298]

Once Frankfurter cleared the indignation hurdle to which he had succumbed in the case of D.C. segregation and went into "judicial mode" on the question of state segregation, there were quite a few judicial obstacles in the way of his personal wishes. One of those obstacles was made palpably evident on the very first day of the 1952 *Brown* oral arguments, when NAACP counsel for appellants in the titular *Brown* case Robert Carter broached the precedent of *Lum v. Rice*,[299] commonly referred to as *Gong Lum*. In *Gong Lum*, the Court had, a mere quarter-century before the first *Brown* hearings, unanimously blessed the segregation statutes of the state of Mississippi. What appeared in *Gong Lum* to be such a formidable obstacle for Frankfurter was not merely its status as a judicial precedent, but also the fact that two of the justices whom Frankfurter held in the highest regard, Holmes and Brandeis, had considered the question and reached the conclusion that segregation was constitutional. During oral argument, Carter claimed that *Gong Lum* should not control segregation in public schools since petitioner Lum had accepted the validity of *Plessy* and "not at all contest[ed] the state's power to enforce a racial classification."[300] Carter contended that *Gong Lum* "cannot be conceded as such a precedent until this Court, when the issue is squarely presented to it, on the question of the power of the state, examines the question and makes a determination in the state's favor; and only in that instance do we feel that *Gong Lum* can be any authority on this question." At this point, Frankfurter intervened to say:

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[298] Id., at 43.
[299] 275 U.S. 78 (1927).
[300] Friedman ([1969] 2004, 19).

> Mr. Carter, while what you say may be so, nevertheless in its [*Gong Lum*] opinion, the Court … did rest on the fact that this issue had been settled by a large body of adjudications going back to what was or might fairly have been called an abolitionist state, the Commonwealth of Massachusetts. Going back to the *Roberts* case,[301] I want to ask you——and, may I say, particularly in a case of this sort, a question does not imply an answer; a question merely implies an eager desire for information——I want to ask you whether in the light of the fact, this was a unanimous opinion of the Court which, at the time, had on its membership Justice Holmes, Justice Brandeis, Justice Stone——and I am picking those out not invidiously, but as judges who gave great evidence of being very sensitive and alert to questions of so-called civil liberties——and I should like to ask you whether you think that decision rested on the concession by the petitioner in that case [*Gong Lum*], and the problem of segregation was not involved and, in fact, that underlay the whole decision, the whole adjudication——whether you think a man like Justice Brandeis would have been foreclosed by the concession of the parties?[302]

Carter replied that he considered Frankfurter's suggestion that the *Gong Lum* Court must have examined the constitutionality of segregation to be only "partially true," but Carter's response is not important for our purposes. What is important to note here is that Frankfurter was wrestling with the fact that Brandeis and Holmes had sustained segregation. This point must have weighed heavily on Frankfurter, especially since Carter did not provide, and the justice himself could not muster, a rationale that would have allowed Frankfurter to compartmentalize or dismiss the fact

[301] *Roberts v. City of Boston*, 59 Mass. 198 (1850). The Massachusetts Supreme Court ruled that segregation in public schools was not inconsistent with the declaration of the state's constitution that "All men are born free and equal, and have certain natural, essential, and unalienable rights."
[302] Friedman ([1969] 2004, 20).

that his mentors——whom he viewed as paragons of judicial reasoning and wisdom——had sustained a practice that he now sought a judicial basis for invalidating.

If judicial temperament and the example of two justices whom he greatly admired predisposed Frankfurter, against the cries of his conscience, toward the factors on the side of segregation in the judicial calculus, so too did his jurisprudential approach. Frankfurter's judicial philosophy is encapsulated in the jurisprudence of Harvard Law Professor James Bradley Thayer, whom Frankfurter termed "the great master of constitutional law." As Frankfurter remarked in anticipation of his judicial duties during a talk at Harvard: "One brought up in the traditions of James Bradley Thayer, echoes of whom were still resounding in this very building in my student days, is committed to Thayer's statesmanlike conception of the limits within which the Supreme Court should move, and I shall try to be loyal to his admonition."[303] That Thayer's doctrine held sway over Frankfurter throughout his tenure on the Court is further suggested by a statement the justice, late in his judicial career (and after the Court had decided *Brown*), made when asked to name an authoritative text on constitutional jurisprudence:

> I am of the view that if I were to name one piece of writing on American Constitutional law . . . I would pick an essay by James Bradley Thayer in the *Harvard Law Review*, . . . published in October, 1893, called "The Origin and Scope of the American Doctrine of Constitutional Law." . . . . [F]rom my point of view [the essay is] the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions.[304]

[303] Kurland (1970, 542).
[304] Phillips (1960, 299-300).

Thayer's essay develops a doctrine of what today might be described as extreme judicial deference to legislation. Thayer held that in determining the constitutionality of a statute, judges must afford legislatures an "allowance . . . for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body." A strong presumption of the constitutionality of legislative action, Thayer claimed, is necessary to respect the Constitution's republican character and the legislative supremacy republicanism commands. Thayer approvingly quoted the dicta of one Chancellor Waites, who in an 1812 South Carolina Case distinguished the discretionary spheres of the judicial and legislative realms:

> … [H]igh deference [is] due to legislative authority. It is supreme in all cases where it is not restrained by the constitution; and as it is the duty of legislators as well as judges to consult this and conform their acts to it, so it should be presumed that all their acts do conform to it unless the contrary is manifest. This confidence is necessary to insure due obedience to its authority. If this be frequently questioned, it must tend to diminish the reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law. It would be unwise on another account. The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution. *The validity of the law ought not then to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy.* By such a cautious exercise of this judicial check, no jealousy of

> it will be excited, the public confidence in it will be promoted, and its salutary effects be justly and fully appreciated.[305]

The Thayer/Frankfurter standard for judicial invalidation of legislative acts on constitutional grounds, then, is a near-universal agreement of unconstitutionality proceeding from manifest or obvious legislative error. The judiciary, Thayer elaborates, "can only disregard" acts of the legislature "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,——so clear that it is not open to rational question."[306] The threshold for a judicial declaration than a statute is unconstitutional is much higher than, because different in kind from, that for a legislator's determination that a proposed bill would be unconstitutional as law.

> This rule recognizes that … much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports. The meaning and effect of it are shortly and very strikingly intimated by a remark of Judge Cooley, to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.[307]

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[305] Thayer (1893, 141-142) [emphasis added].
[306] Id., at 144.
[307] Id., at 144.

Finally, as a matter of practice, in deciding whether a law is constitutional, courts should also consider the likely reaction of the affected branches. Judges must not only decide whether a law is so obviously unconstitutional that no one can rationally deny that it is, but also adopt only "what judgment is permissible to another department which the constitution has charged with the duty of making it." The courts are therefore not only constrained by an exceptionally high threshold of judicial intervention, but by strategic calculations of what other actors——the other branches of the federal government, the states, and the public, depending on who is affected by a particular ruling——will accept.

Frankfurter's jurisprudential philosophy likely exacerbated the conundrum posed by the state cases by creating a massive obstacle between the justice and (to borrow Kluger's evocative expression) "the humanitarian goal his deepest conception of justice cried out for him to reach."[308] Another way of saying this is that even though Frankfurter possessed a powerful moral motivation to overturn segregation *in toto*, when considering only the factors that Frankfurter's philosophy recognized as legitimate inputs to the judicial process, there was not a good case for invalidating segregation in the states. As Frankfurter remarked at the 1953 conference, (1) as a matter of pure history, the adoption of the Fourteenth Amendment did not abolish segregation in 1868, (2) the history of the Amendment was "[i]nconclusive" as to whether segregation could be targeted, even at a future date, under the proposers' or ratifiers' understanding of due process and equal protection, (3) legislation adopted by the 39th and subsequent Congresses "presuppose[d] that segregation is valid, and (4) "history in Congress and in this [C]ourt indicates that Plessy is right." Douglas' notes, from which these statements are drawn, did not record whether Frankfurter said how he would vote. Presumably, he had not so indicated.

[308] Kluger ([1976] 2004, 684).

For Frankfurter, declaring segregation unconstitutional would be to override more than a half century of precedent stretching back to *Plessy*. It would be to invalidate a form of judicial "promise" the Supreme Court had made *to the states*[309] in 1896, and periodically reaffirmed in the intervening years, that state caste laws were valid under the Fourteenth Amendment. In the terms of Frankfurter's judicial philosophy, the decades during which the Court had acquiesced in and periodically reaffirmed *Plessy* had created an expectation in the minds of reasonable people in the states that segregation statutes were constitutional: such laws, as Reed's conference comments evinced, were not obviously irrational to many Americans at the time. Moreover, Frankfurter probably lacked personal acquaintance with a victim of state-level segregation, knowledge of whose experiences might have delivered Frankfurter from these tedious judicial considerations by "short-circuiting" a determination in the justice's mind that state segregation was profoundly, incorrigibly unfair. Of course, Frankfurter knew and even *felt* segregation as practiced by the states was immoral, but it failed to elicit for him the powerful intuitions that allowed him to so quickly determine, without judicial reasoning or analysis, that D.C. segregation was unconstitutional because, in short, unjust. Consequently, Frankfurter was stuck: trapped between, on the one hand, his *moral* and *personal* desire to correct what he viewed as a profound and, on any non-judicial basis, indefensible wrong, on the other, an equally powerful desire to hew to a code of judicial conduct rooted in the Thayerian jurisprudence that comprised the core of his identity as a scholar and jurist.

Despite the pivotal role intuitions almost certainly played in Frankfurter's different attitudes toward D.C. and state segregation, there were also a doctrinal (i.e., judicial) reasons, if he decided to search for them, by which Frankfurter could more comfortably declare D.C. segregation

[309] The Court had never made such a "promise" to the federal government.

unconstitutional. First, the Court had never sustained federal caste laws. A decade before, in *Hirabayashi v. United States*[310] and *Korematsu v. United States*,[311] the Court had approved, on the basis of alleged military necessity, executive wartime measures that discriminated on the basis of race, but the justices had never created the impression that federal law that did the same in peacetime would be sustained under the Fifth Amendment. Thus, for Frankfurter, finding that congressionally-sanctioned segregation was a violation of Due Process was more compatible with his judicial philosophy than finding the same of state-imposed segregation. However, for the reasons discussed above, this fact was not likely causative of Frankfurter's quick and emotive determination that segregation in D.C. was "*intolerable*."

Second, on the score of Thayerian strategic considerations, Frankfurter would have also been justified in assuming that overturning segregation in Congress would invite less resistance and controversy than doing so in the states. Though segregated education was the fruit of postbellum liberalism, having been implemented by the same Congress that framed and proposed the Fourteenth Amendment, by 1950 that postbellum racial egalitarianism was strikingly insufficient, even regressive, by the standards of liberal sentiment in mid-20th Century America. In the liberalizing racial atmosphere of the 1950s, if desegregation-acquiescent or -favoring Congressmen did not form an outright majority in Congress, and if those members were denied access to legislative veto points afforded by the congressional committee seniority system, such members still certainly formed a rapidly-growing plurality. So long as legislative initiatives could be stymied by the Southern committee chairmen who predominated in Congress, federal legislative relief would not be forthcoming, but Frankfurter could count, and (given his extensive connections in Washington)

[310] 320 U.S. 81 (1943).
[311] 323 U.S. 214 (1944).

probably knew he could count, on many members of Congress enthusiastically greeting a decision by the Court invalidating segregation in D.C.

Ironically, because Frankfurter had likely concluded that segregation in D.C. violated due process without recourse to formal judicial reasoning, he never, so far as the record shows, developed or employed any of the above considerations. Even had he done so, these ruminations would probably have proven unhelpful for solving his real conundrum: developing a judicial rationale for invalidating segregation in the states. Frankfurter instead tried to break that impasse by assigning his 1952 term clerk, Alexander Bickel, the task of writing a research report on the legislative history of the Fourteenth Amendment. As we saw in Chapter 4, though, Bickel's research failed to uncover a smoking gun in the legislative history that would have enabled Frankfurter to conclude that *Plessy* and its progeny were predicated on a gross misinterpretation of the Amendment's purposes. The interpretative gloss Bickel consequently developed and presented to his boss in both his Prefatory Note and his farewell missive was therefore essential to rescuing a judicial case for invalidating segregation from the depressing results of the Amendment's legislative history. As we have already seen, Bickel declared in the cover letter appended to the draft of the memorandum that he prepared for and left with Frankfurter: "I think the legislative history leave this Court free to remember that it is a *Constitution* it is construing. I think also that a charitable view of the sloppy draftsmen of the Fourteenth Amendment would ascribed to them the knowledge that it was a *Constitution* they were writing."[312]

Viewed from the context of Frankfurter's purpose in assigning that project, Bickel's claim is more motivated rationalization than dispassionate and sincere interpretation of the historical

[312] Felix Frankfurter Papers, Library of Congress.

evidence he compiled. Bickel's interpretative gloss seems to be designed to elide the uncomfortable fact that, as we saw in Chapter 4, Bickel's research did not turn up an *affirmative historical warrant* to interpret the Fourteenth Amendment to require protection for the social and political rights of blacks. While it would take a few months for Bickel's memo to work the full measure of its magic on Frankfurter's stance toward the constitutional merits of the NAACP's position in *Brown*, the memo's influence was already evident in the cover letter Frankfurter attached to copies of Bickel the memo that he disseminated to the Conference at the beginning of the October 1953 term. "The [Bickel] memorandum indicates that the legislative history of the Amendment is," Frankfurter stated, "in a word, inconclusive, in the sense that the 39th Congress as an enacting body neither manifested that the Amendment outlawed segregation in the public schools or authorized legislation to that end, nor that it manifested the opposite." This formulation might be strictly true because of the qualification "as an enacting body," but, as Chapter 4 demonstrates, it is misleading.

Presumably, if the Amendment did not outlaw segregation or authorize Congress to do so, then the Frankfurterian judicial case for invalidating state-required segregation is thin indeed. But that is not the conclusion Frankfurter advanced, or the hard reality he faced up to, either in his cover letter to the Bickel memorandum, or the 1953 *Brown* conference, where, despite conceding that "the history in Congress and this [C]ourt indicates that Plessy is right," the justice nonetheless refused to concede defeat with respect to his goal of invalidating segregation. At the 1953 conference, Frankfurter instead repeated Bickel's contention that the Amendment's legislative history is indeterminate. Doing so enabled him to keep alive the possibility of joining his conscience and the emerging desegregationist majority.

In 1979, with a quarter century of hindsight on *Brown*, the aforementioned Philip Kurland would note that judicial examination of the legislative history of constitutional provisions to determine their meaning was, prior to *Brown*, customary. To illustrate his point, Kurland quoted Jacobus Ten Broek, "the prime explicator of the 'old equal protection,'" who fifteen years before *Brown* declared: "[w]henever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretation, it has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it."[313] Turning his attention to *Brown*, Kurland then observed:

> It must be conceded that this resort to history was that of advocates for a position. As such landmark cases as *Dred Scott v. Sandford*, *Myers v. United States*, *Pollock v. Farmers' Loan & Trust Co.*, and *Plessy v. Ferguson* quickly reveal, the Justices readily found in the framing of the constitutional provisions at issue whatever intent they wished to find. A reader of the Court's opinion in *Brown* might be excused his cynicism which suggests that a finding of neutrality in the constitutional history means that there was no support to be found for the position that the Court was prepared to take.[314]

Frankfurter appeared to have effectively deluded himself about the implications of the legislative history of the Amendment for the outcome in *Brown* that his conscience sought. Had Frankfurter been less emotionally involved in *Brown*, it is conceivable that he would have ultimately abided, however reluctantly, the limits that a lack of amenable legislative history imposed on the Frankfurterian universe of judicial possibility. But the record suggests his deeply-felt commitment to

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[313] ten Brock (1939, 399) *accord* Kurland (1979a, 315).
[314] Kurland (1979a, 315-316). Internal citations omitted.

achieving "a great good for our nation" was too strong. Sometime between December 12, 1953 (the date of the second *Brown* conference), and January 15, 1954, Frankfurter the moral thinker overcame the self-imposed constraints of Frankfurter the jurist.

We know this because on January 15, Frankfurter disseminated a memo to the conference announcing that he was shifting his focus to the remedy phase. This shift implied that he had decided to join the five-justice majority that had emerged at the December 12, 1953 *Brown* conference, at which early date, as we have seen, Frankfurter was not yet prepared definitively to cast aside the judicial qualms staying his hand on the merits. In the cover letter to his January 15 memo, Frankfurter wrote: "As is doubtless true of the rest of you, all sorts of considerations have arisen within me in regard to the fashioning of a decree. In order to judge the worth of these worries more clearly, I subjected them, sometime ago, to the test of paper." The brainstorm encapsulated in the memo, Frankfurter stated, was intended to provide "clarification of [his] own mind." He decided to circulate it to the conference in the hopes that it "may stimulate good thoughts in others."[315] The five-page memo will be analyzed in detail in chapter 7, but for present purposes, provides a book-end for Frankfurter's transition from conflicted jurist to enthusiastic partisan of judicial desegregation.

More revealing of Frankfurter's torn mindset toward *Brown* is a two-page memo the justice composed, in similar fashion and with an analogous purpose to his January, 1954 memo on decree, of his brainstorm on the case's merits. Unlike the document detailing his thoughts on the decree, this memo was neither dated nor distributed to the Brethren. However, Kluger speculates that the memo was composed "more than likely in the weeks just after the reargument of *Brown*," i.e., the last half of December, 1953. In it, Frankfurter begins by declaring that the *Segregation Cases*

[315] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

> present a legal issue inextricably bound up with deep feeling on sharply conflicting social and political issues. The legal issue derives from the established practice of exercising judicial authority when appeal is made to vague provisions in the Civil War Amendments. While it has now been settled beyond question that some of the guaranties of the Constitution are not judicially enforceable, e.g., the guarantee of a republican form of government, amendments to the Constitution introduced in the reconstruction period, no less vague and no more appropriate for judicial judgment, serve as the basis for adjudication.[316]

In other words, Frankfurter confirms what his conference comments implied: that he was still struggling with the fact that he lacked a clear, affirmative judicial justification for invalidating segregation. (There was certainly enough historical material, presented by both the litigants and Bickel, to sustain the practice if the justice wished to.) However, the memo quickly evinces beyond a doubt that Frankfurter was cognizant of his own internal struggle and, to a surprising degree, of the nature of the moral psychological forces by which he was being buffeted.

In the memo, Frankfurter's framing of the conundrum in which he found himself is strangely impersonal: he consistently used either the first person plural or the third person voice to articulate the unique challenge facing him, even though (as he must have known from the conference discussions) of all the justices, it faced him and him alone. The peculiar framing suggests a desire on Frankfurter's part to distance himself from the challenge he was describing, as if that conundrum had entrapped others, but not him, a man who, according to his own self-conception, was uniquely suited for judicial office by temperament, background, and jurisprudential philosophy. The belief that such a man could extract himself from the storm of the passions and see the

[316] Kluger ([1976] 2004, 686-687).

forest through the trees is precisely the kind that would induce the impersonal framing of Frankfurter's memo. Finally, subjecting the thoughts and sentiments floating around in his head to "the test of paper," to use the justice's expression, was probably the last, desperate effort the justice made to reconcile the disconnect between his conscience and the dictates of his judicial philosophy on the *Brown* merits. After all, as Frankfurter remarked in January 15, 1954 remedy memo cover letter, he sometimes put "worries" to "the test of paper" "to judge [their] worth [] more clearly." He was probably doing the same here.

The memo continues: "The inevitable result is that issues are cast in legal form for disposition by this Court that are embroiled in explosive psychological and political attitudes." This appears to be an acknowledgment, oblique due to its impersonal framing, that Frankfurter himself found it difficult to quarantine his private conscience, harboring "psychological and political attitudes," from his role as a judge, as his customary judicial practice required. He underscores the force of that judicial commitment in the succeeding lines:

> However, it is not our duty to express our personal attitudes toward these issues however deep our individual convictions may be. The opposite is true. It is our duty not to express our merely personal views. However passionately any of us may hold egalitarian views, however fiercely any of us may believe that such a policy of segregation undoubtedly expresses the tenacious conviction of Southern States [is] both unjust and short-sighted, he travels outside his judicial authority if for this private reason alone he declares unconstitutional the policy of segregation.

With this last remark, consciously or not, Frankfurter built himself an escape hatch, if only he could find a way to fit himself through it. Private egalitarian sentiment, like the kind Frankfurter harbored, is not "alone" sufficient to invalidate segregation, but neither does its presence in the

conscience of judges invalidate any judicial conclusions commensurate with that private commitment. Those judges, however, badly need a convincing constitutional rationale independent of their private moral opinions.

Reacting to the deeply repugnant prospect of affirming segregation, Frankfurter next declared, "Equally so he [the judge] cannot write into our Constitution a belief in the Negro's natural inferiority or his personal belief in the desirability of segregating white and colored children during their most formative years." That this comment is motivated by an emotional reaction is suggested by the fact that (as Frankfurter must have known in his calmer moments) sustaining the constitutionality of segregation would in no way chisel such views into the hallowed marble of the Constitution. What the Constitution permits, it does not thereby endorse or require. Presumably, for example, the Constitution allows states to repeal their laws against interpersonal violence, even homicide. It does not, however, by allowing states such legislative leeway, sanctify or celebrate the uses of that discretion. Certainly, there would have been no question in Frankfurter's time (or mind, on any analogous issue) that the Constitution could be read otherwise.[317] Moreover, in his concurrence in *Korematsu*, Frankfurter explicitly recognized this principle, when, after sustaining the racially discriminatory military orders under attack, he contended that the orders' constitutionality neither depends upon nor implies their morality. "To find that the Constitution does not forbid the military measures now complained of," Frankfurter wrote, "does not carry with it approval of that which Congress and the Executive did. That is their business, not ours."[318]

Returning to the *Brown* memo, Frankfurter continued:

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[317] Although in the wake of the judicial innovations purchased in part with the moral capital the Court earned for deciding *Brown*, even this broadly shared consensus would come within two votes of being overturned in 1989 (*DeShaney v. Winnebago County*, 489 U.S. 189 (1989)).

[318] *Korematsu v. United States*, 323 U.S. 214 (1944), at 225.

> To attribute such a view [that blacks are "naturally inferior"] to science, as is sometimes done, is to reject the very basis of science, namely, the process of reaching verifiable conclusions. The abstract and absolutist claims both for and against segregation have been falsified by experience, especially the great changes in the relations between white and colored people since the first World War.

This last statement appears to reflect Frankfurter's conceit of remaining studiously evenhanded, even as he was grappling desperately with discovering a judicial path to overturn segregation. Precisely which of "the abstract and absolutist claims … against segregation" Frankfurter would have viewed as falsified is unclear, but his next lines suggest that such claims might have been claims about the burdening and retarding effects of segregation on black pupils. "The inequities and hardships of a policy of segregation have in the short period of thirty odd years undergone great amelioration," the justice remarked. "The promising results of this tendency afford no ground for complacency. But it is fair to say that the pace of progress has surprised even those most eager in its promotion."[319] Nonetheless, the justice's own admission that blacks have progressed more rapidly than anticipated by even their most ardent allies *despite being subject to segregation* does not afford him any occasion to consider, if only for the sake of argument, whether this empirical progress belies the contention that segregation denies blacks the equal protection of the laws. Instead, Frankfurter segues seamlessly to floating considerations more amenable to his acknowledged egalitarian commitments:

> The outcome of the Civil War, as reflected in the Civil War Amendments, is that there is a single American society. Our colored citizens, like the other components which make up

[319] Kluger ([1976] 2004, 687).

> the American nation, are not to be denied the right to enjoy the distinctive qualities of their cultural past. But neither are they to be denied the right to grow up with other Americans as part of our national life. And experience happily shows that contacts tend to mitigate antagonisms and engender mutual respect.[320]

This is the most sympathetic face for the integrationist cause that could be put on the Civil War and the ensuing Amendments. It is the portrait of American society that the NAACP labored for two years to paint for the Court. But it is more reflective of racial egalitarians' aspirations for American society in the middle of the twentieth century than the historical empirics of the preceding hundred years, as a perusal of Rogers Smith's *Civic Ideals*[321] will attest.

In the decade from 1866 to 1876, in what Smith terms America's "radical hour," racial egalitarianism in American society reached a local maximum with the adoption of the Fourteenth and Fifteenth Amendments. The latter, however, was far from a radical measure, as "it did not confer any right to vote per se" and "left the states power to enact many other restrictions, including property qualifications and exclusions from office holding, that could negate the formal political rights of blacks and many other citizens as well."[322] Following the Fifteenth Amendment's passage, Reconstruction was brought to an end by a reinvigorated racism that had been "for a time submerged by the egalitarian religious and moral principles that came to define the war's mission for many Northerners." After 1870,

> new theories of racial evolution also began elevating the intellectual credibility of scientific racism to new heights…. This racism, old and new, mass and elite, proved most crucial to Reconstruction's demise, and it was his unwillingness to break from his class and region's

[320] Id., at 687-688.
[321] Smith (1977).
[322] Id., at 314.

especially potent heritage of prejudice that most accounted for Andrew Johnson's fateful obstructionism.[323]

Though the Democratic Party's postwar electoral fortunes were ruined for two generations by its defense of the "discredited causes of slavery and secession," "their enduring tenets of white male supremacy, states' rights, and no special privileges for any groups all retained great popular appeal even at their lowest ebb, in the mid-1860s."[324] Most Republicans, in turn, "were former Whigs who usually favored only the first——white supremacy——and they were joined uneasily by egalitarian white radicals and new black voters, who challenged all three." Reconstruction resulted in the creation of "the great new legal systems of racial equality" for which it is remembered, "but soon, many white Americans felt threatened by the radical changes those laws entailed." Accordingly, "[f]rom the early 1870s on, prominent Republicans began turning away from the now-scorned cause of genuine racial justice. By the mid-1890s, the legal pillars of equality the had erected with so much hope and pain became imposing but empty monuments to an abandoned dream."[325]

This historical account of the prevalence of racism after the Fifteenth Amendment-writing process (and even during it) is hard to square with Frankfurter's assertion that "the outcome of the Civil War, as reflected in the Civil War Amendments, is that there is a single American society." That single American society had somehow managed to segregate itself for ninety years despite Frankfurter's declaration of its unity. Now, it might be objected that Frankfurter intended his remark about the "outcome of the Civil War" in a normative, not a declarative, sense. And that may well be. But in this memo, Frankfurter appeared still to be grappling with the lack of a clear,

[323] Id., at 288.
[324] Id., at 288-289.
[325] Id., at 289.

affirmative, historical warrant that was compatible with his judicial philosophy and would enable him to reach the conclusion he sought. He was clearly putting "to the test of paper" whatever thoughts he could muster to produce a theory that would get him across the judicial finish line in *Brown*. And, I believe, it is against that framework that his recorded thoughts must be construed.

On reargument in 1953, the defendant states (all, with the exception of Delaware, respondents in the *Brown* litigation before the Court) had demonstrated in their briefs if not the precise history that Smith would later canvas, then legislative history that tends strongly to belie Frankfurter's reading of the Civil War Amendments. According to the Kansas brief, in 1868, 24 of 37 of the states that then comprised the Union "maintained legal segregation at the time of adopt[ing]" the Fourteenth Amendment "or subsequent thereto." Moreover, legislatures in 10 of those 24 states had during the same legislative term ratified the Fourteenth Amendment and "provid[ed] for segregated schools."[326] Finally, and perhaps most fatal to Frankfurter's reading, the 39th Congress, which authored the Fourteenth Amendment, "enacted laws to implement and expedite the administration of the segregated system of public schools" in the District of Columbia.[327] Whether Frankfurter intended his remark that "the outcome of the Civil War, as reflected in the Civil War Amendments, is that there is a single American society" descriptively or aspirationally, it is hard to square either reading satisfactorily with Smith's history of the period or the facts of which Frankfurter was no doubt aware from the briefs of Kansas, South Carolina, and others. The justice's "reasoning" in this specific respect was more likely than not motivated by a desire to reach an outcome his conscience favored.

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[326] *Brown v. Board of Education*, 347 U.S. 483 (1954). APPELLEE'S BRIEF a.k.a. "Brief for the State of Kansas," at 34-35. File Date: 11/30/1953. 98 pp. Term Year: 1953. U.S. Supreme Court Records and Briefs, 1832-1978. Gale, Cengage Learning. University of Texas at Austin - Law. 31 July 2017.
[327] Id., at 32-33.

Frankfurter continued:

> The legal problem confronting this Court is the extent to which this desirable and even necessary process of welding a nation out of such diverse elements can now be imposed as a matter of law upon the States in disregard of the deeply rooted feeling, tradition and local laws, based upon local situations to the contrary. The basis of such legal compulsion, if the Constitution requires it, is a provision of the Fourteenth Amendment, whereby a State is forbidden to "deny to any person within its jurisdiction the equal protection of the laws."[328]

Here, Frankfurter appeared to be recurring to the majority-friendly assimilationist mythos, today firmly discarded, of America as "melting pot." Himself an immigrant from what at the time of his migration was the Austro-Hungarian Empire, the justice evidenced the melting pot's personal allure in terming it "desirable and even necessary." He countenanced the possibility that the Constitution may even require it. Finally, he acknowledged in passing that there exist "local situations to the contrary," supporting the proposition that his earlier comment about the "outcome of the Civil War" was more aspirational than empirical.

> But the equality of laws enshrined in a constitution which was "made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues," *Hurtado v. California*, 110 U.S. 516, 530, 531, is not a fixed formula defined with finality at a particular time. It does not reflect, as a congealed summary, the social arrangements and beliefs of a particular epoch. It is addressed to the changes wrought by time and not merely the changes that are the consequences of physical development. Law must respond to transformation of views as well as to that of outward circumstances.

[328] Kluger ([1976] 2004), at 688.

> The effect of changes in men's feelings for what is right and just is equally relevant in determining whether a discrimination denies the equal protection of the laws.[329]

Frankfurter finally appeared to reach the judicial conclusion that his private conscience so ardently sought. He was able to do so by supplanting an unattractive interpretation of the Fourteenth Amendment suggested by its unhelpful historical circumstances with a melting pot model and prescription of national life that at the time resonated deeply with almost all Americans and the justice himself. However, Frankfurter's choice of corroborating dictum from *Hurtado v. California*,[330] of all cases, reveals the motivated character of his reasoning. In *Hurtado*, the Court held 8-1 that the Fourteenth Amendment's Due Process Clause did not "require an indictment by a grand jury in a prosecution by a State for murder."[331] It did so against claims by the petitioner, Joseph Hurtado, who had been found guilty of murder without the indictment of a grand jury, that a grand jury indictment prior to prosecution for a capital crime was an inherent component of "due process of law." That is, the Court in *Hurtado* was unprepared to incorporate through the Due Process Clause of the Fourteenth Amendment the protections enumerated in the Bill of Rights (including a specific clause in the Fifth Amendment requiring the indictment of a grand jury for a "person [to be] held to answer for a capital or otherwise infamous crime") against the states. The clearest lesson *Hurtado* presents for judicial decision-making in *Brown* is diametrically opposed to Frankfurter's desire to construe another clause of the same Amendment in the latitudinarian fashion that the *Hurtado* Court emphatically rejected.

Frankfurter deployed the *Hurtado* dictum to reinforce his argument that a kind of melting pot of peoples and cultures was an integral design feature of the American polity, and implied that

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[329] Ibid.
[330] 110 U.S. 516 (1884).
[331] Ibid.

the Court's purposes include both facilitating the "welding" of disparate peoples into a common American mould and superintending the evolution of the country's institutions and political principles. However, the dictum appears in the context of the *Hurtado* Court's preemptive rebuttal of Justice Harlan's argument in dissent that to determine whether a law violates due process, one need only examine "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors."[332] In full, the *Hurtado* majority declared:

> The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we

[332] Id., at 542, quoting *Murray's Lessee v. Hoboken*, 18 How. 272 (1856), 267-277.

should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.[333]

The *Hurtado* Court dictum about an "undefined and expanding future" upon which Frankfurter apparently relied to conclude that "[l]aw must respond to transformation of views as well as to that of outward circumstances," was deployed to somewhat different effect by the *Hurtado* Court: to emphasize the versatility of the *common law*, not the constitutional law that it expounds, to deny that Due Process can come to encapsulate what a plain reading of the Fifth Amendment suggests it does not. Frankfurter's approach to the Fourteenth Amendment in his disquisition on *Brown* reflects the "characteristic" flexibility of the common law, which "draw[s] its inspiration from every fountain of justice," more than it tracks the judicially deferential posture of the *Hurtado* Court majority, which claimed to abjure expounding the Constitution with the same liberal discretion as it might the common law. Frankfurter's declaration that the Constitution "does not reflect, as a congealed summary, the social arrangements and beliefs of a particular epoch" but "is addressed to the changes wrought by time," including the "transformation of views," elides consideration of the means by which those changes might be constitutionally incorporated. Frankfurter the jurist might have acknowledged his own philosophy's limitations on judicial discretion in favor of the Article V Amendment processes. But that would not have sufficed to resolve the pressing necessity the justice felt in being forced to take a position in a case in which he was profoundly emotionally invested. Frankfurter had to instead bridge the personal with the judicial. He therefore weakly concluded: "The effect of changes in men's feelings for what is right and just is equally relevant in determining whether a discrimination denies the equal protection of the laws."

[333] Id., at 530-31.

By elevating the "changes in men's feelings for what is right and just" to the category of factors, such as the "transformation … of outward circumstances," of which the judiciary may legitimately take notice in expounding the Constitution, Frankfurter finds a way to circumvent the prohibition imposed by his judicial philosophy on basing constitutional interpretations on "private reason[s] alone." The phrasing of the concluding sentence in Frankfurter's last known memo on the *Brown* merits is also revealing. First, he said "men's *feelings*," i.e., sentiments or emotions, "for what is *right and just*," i.e., moral. This coheres perfectly with the social intuitionist model's prediction that intuitions and emotions precede and cause moral judgment. It also evinces the connection and parallel that I have alleged exists between judicial decision-making in hard cases and moral decision-making. The same modules of the mind seem to be in play: judicial decision-making in hard cases is essentially moral. Judges invariably ask themselves, at varying levels of conscious articulation, What outcome accords with principles of justice? Which outcome is satisfying? Answering these questions requires the use of the judge's personal intuitions and sentiments, including deep-seated and often poorly understood ones. Indeed, as the foregoing analysis of Frankfurter's memo amply demonstrates, the boundary between judicial reasoning on the basis of neutral principles and moral reasoning to justify outcomes favored by moral intuitions becomes extremely fuzzy. Second, Frankfurter used weasel phraseology to obscure the fact, possibly to himself, that he lacked a defensible theory of how such changes might be legitimately constitutionally incorporated by the judiciary (again, under the terms of his own judicial philosophy). Changes in men's opinions are "*relevant* in determining whether a discrimination denies the equal protection of the laws." How relevant, and a method for calculating the relevance, were left unstated. So too was whether the character of the determination is judicial, legislative, personal, some mix of the three, or something else entirely.

Of the last lines of Frankfurter's memo, Kluger remarks the following. "[Frankfurter] was ready to say, if he chose to mobilize the thoughts in the memo, that the Court was free to reinterpret the Constitution on the strength of 'changes in men's feelings for what is right and just'—which was really the only justifiable ground for its intrusion into the deeply held convictions of the white people in command of the segregating states." In acknowledging forthrightly that the moral views of the members of the Supreme Court were "the only justifiable ground" for the Court's "intrusion" into the social practices of the South, Kluger evinces a probity that Frankfurter did not muster with respect to his own behavior on the merits of *Brown*. From the vantage point of his own judicial philosophy, the conclusion in Frankfurter's memo represents a strained and circuitous rationalization, closer to willful self-deception than disinterested judicial reasoning.

Mark Tushnet advances a theory of Frankfurter's behavior in *Brown* basically consonant with, although emphasizing different factors than, my own. Canvassing the justices' conference notes, Tushnet concludes that throughout the terms the Court was considering *Brown*, Frankfurter viewed himself as a central player in the Court's affairs, but struggled to reconcile that self-conception in *Brown* with the objective fact that he was precluded by his tumultuous internal struggle from joining the other justices on the merits until relatively late in the game. Accordingly, Tushnet suggests that during the 1953 term the justice "developed a story about *Brown* in which he played a central and positive role in delaying decision by writing the questions to be asked in the order for reargument, thereby allowing the Court to come to a more mature and considered decision."[334] This story, disseminated to Frankfurter's law clerks and others, holds that without the Frankfurter's ingenuity in securing five votes to delay decision and put the cases down for reargument, *Brown*

[334] Tushnet and Lezin (1991, 1920).

would have been decided under Chief Justice Vinson, whose inability to effectively lead the justices would have produced a deeply divided outcome on the merits. As Frankfurter remarked in a letter to Justice Reed after *Brown I*: "I have no doubt that if the Segregation cases had reached decision last Term there would have been four dissenters—Vinson, Reed, Jackson and Clark—— and certainly several opinions for the majority view. That would have been catastrophic."[335]

In addition to the tale that Frankfurter wisely and auspiciously intervened to spare the Court an ignominious self-defeat, Tushnet contends that the justice "developed a similar story about the gradualism of the remedy that the Court ultimately ordered."[336] As we have seen, because Frankfurter's "resources as a lawyer were exhausted without turning up a legal justification for what he agreed was a 'congenial' political solution," he was "essentially paralyzed."[337] He overcame this paralysis, according to Tushnet, ultimately by turning his attention to the remedy phase of the *Brown* case, which for Frankfurter was far more susceptible than the outcome on the merits of a technical, legal (and therefore, in Frankfurter's eyes, judicially legitimate) resolution. However, an open question in Tushnet's account is how Frankfurter was able to reach a decision on the merits: certainly something must have induced the move from paralysis to energetic contemplation of a remedy. Tushnet implies that the trigger was Frankfurter's realization that it was futile to continue attempting to justify overturning segregation judicially, but that the best thing to do, the just thing to do, would be to forge ahead anyway. Both to "hide" this fact from himself (and perhaps to forget it) and to "atone" for the lack of a judicial resolution on the merits, Frankfurter then employed a far more legalistically intensive approach to the remedy phase.[338] As we have seen,

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[335] Schwartz (1983, 72).
[336] Tushnet and Lezin (1991, 1920).
[337] Id., at 1919.
[338] Tushnet remarked: "If he [Frankfurter] characterized the development of a gradualist remedy as a legal rather than a political problem … he would have an issue in which Frankfurter the lawyer could sink his teeth. At least in

though, the moment at which the justice decided likely came when or shortly after he composed the undated memo we recently visited. Moreover, the memo strongly indicates that Frankfurter never acquiesced to the idea that invalidating segregation was hopelessly irreconcilable with his own judicial philosophy. Rather, he struggled mightily to render the judicial resources at his disposal into a "congenial," if obviously stressed, shape. Once the justice finally succeeded in doing so, he was able to go "all in" on desegregation. Articulating the final sentences recorded in his memo on the *Brown* merits bridged the personal and the judicial for Frankfurter, and the single piece of evidence he required to answer "*Can* I believe it?" in the affirmative was finally at hand.

That this is so is additionally suggested by the opening sentence of Frankfurter's aforementioned January 15, 1954 memo on remedy: "As is doubtless true of the rest of you, all sorts of considerations have arisen within me in regard to the fashioning of a decree." Once the handcuffs preventing him from reaching the conclusion his conscience sought came off thanks to the key that the rationalizations in his earlier memo provided, Frankfurter sought to restore himself as quickly as possible to a pivotal position in the Court's business on the most important case before it that term, a desire that the extensive considerations presented in the memo on remedy demonstrated.

Over the course of a year, from the first arguments on *Brown* in December 1952, until sometime between December 12, 1953, and January 15, 1954, Frankfurter underwent an intense internal struggle to convince himself that a judicial basis existed for doing what he believed to be "right and just" on the *Brown* merits. In so doing, he exhibited perhaps the highest degree of confirmation bias, motivated reasoning, and intuition-led moral decision-making of any of the justices

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retrospect, Frankfurter developed a story about Brown in which he played a central and positive role in delaying decision by writing the questions to be asked in the order for reargument, thereby allowing the Court to come to a more mature and considered decision. He developed a similar story about the gradualism of the remedy that the Court ultimately ordered" (Tushnet and Lezin 1990, 1920).

who ultimately voted in *Brown I*. None of my analysis, however, supports impugning Justice Frankfurter. Frankfurter was a first-rate legal mind who took his role as a jurist more seriously than perhaps any other justice who served with him. The tremendous personal struggle of which he left written record to history should, in my view, be construed as an illustration of his fierce devotion to his vocation, and the particular conception of the role and limits of the federal judiciary that he brought to it. In the end, Frankfurter was, like every other person who has graced the nation's highest Court, all too human. He could not resist his conscience for the sake of adhering to his philosophy when the result his conscience sought was inevitable anyway. Both the country and the Court, Frankfurter appeared to conclude, were better served by justice and judicial unanimity in the achievement of it than they were by a completely rigorous adherence to the judicial philosophy that Frankfurter spent the overwhelming remainder of his professional life abiding, expounding, and preaching.

Chapter 7. Robert Jackson

Like Frankfurter, Jackson was one of the three justices whose votes were uncertain after the 1952 conference. The evolution of Jackson's views over the course of the *Brown* hearing and rehearing would parallel that of Frankfurter's, although Jackson's would cause him appreciably less personal turmoil. Jackson's problem from day one of the *Brown* deliberations was that he felt that the history of the Fourteenth Amendment, with which he was familiar from as far back as the *McLaurin* and *Sweatt* litigation in the spring of 1950, did not support a judicial case for invalidating segregation. Jackson never doubted that Congress had the power under Section 5 of the Fourteenth Amendment to terminate local segregation——the Amendment's history notwithstanding——but his sense of probity and view of the judicial process led him to conclude that the history of the Amendment did not provide the *judicial* authority for interpreting the Equal Protection Clause to proscribe segregation. It was for this reason that Jackson on more than one occasion remarked to the other justices that he would be willing to "go along" with desegregation, but that the Court should acknowledge that its decision could be justified only on the basis of political, not judicial, reasons.

Jackson's comments at the 1952 conference were pithy. He began by suggesting that the justices not take a vote on the case, although the reason for which he made his suggestion was not recorded by any of the other justices.[339] Then, Jackson made a comment that distinguishes the framing of his remarks from that of the other justices': "start as a lawyer."[340] Presumably, this comment was Clark's shorthand for Jackson's announcement that Jackson sought to approach the

[339] Perhaps he did not give one. In any case, and as we have already seen, Chief Justice Warren would follow Jackson's precedent a year later by repeating the suggestion at the second *Brown* conference.
[340] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.

cases as a lawyer——not as a sociologist, a private citizen, a man pursuing justice, or a judge desirous of making history. The importance of Jackson's unique framing in announcing that he was approaching the case "as a lawyer" might be overstated, but I think it illustrates that of all the justices, Jackson appeared to have the most emotional distance on the moral questions presented in *Brown*. The examination to follow of Jackson's letters to a close friend and his *Brown* memo brainstorms will confirm this impression.

Jackson next delved into his analysis. "Nothing in text that tells me this is unconstitutional. (Marshall's brief starts and ends with sociology) and nothing in legislative acts."[341] Douglas recorded him as saying, "nothing in the text" of the Constitution, "nothing in the opinions of the courts," and "nothing in the history of the 14th Amendment" suggested that segregation is unconstitutional.[342] Jackson remarked that he was "not conscious of the problem until I came here – we had segregation in Jamestown, [NY]" (Jackson's hometown). The last pronouncement Clark recorded is rather cryptic. "If can work it out so we can say segregation 'bad' – under approval of Court & support of Congress – and must be done in certain period."[343] Douglas and Burton, respectively, note that Jackson added, "it will be bad for the negroes to be put into white schools," and "I don't know what the effect of segregation or reason for it but can't cure this situation by putting children together."[344]

A year later, after the rehearing of the cases on the legislative history of the Fourteenth Amendment, Jackson began his peroration at the second *Brown* merits conference by rather bluntly asserting that "education at time of the 14th amendment was not an issue." That is, if education

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[341] Ibid.
[342] William O. Douglas Papers, Box 1150, Library of Congress.
[343] Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, University of Texas at Austin.
[344] William O. Douglas Papers, Box 1150, Library of Congress; Hockett (2013, 65).

was not foreseen by the Amendment's framers as an area of social life to which the guarantees of the Amendment might someday apply, then there was no judicial basis eighty-five years later for declaring that the Amendment now so extended.[345] Indeed, Jackson continued, the legislative history would need to provide some affirmative warrant for reinterpreting the Amendment as urged by the NAACP, since a straightforward application of "precedents and custom" would otherwise sustain *Plessy*. But the legislative history, Jackson emphasized, does not say what the five votes for reversal claim and want it to. The problem, therefore, is the same the Court faced the first term it heard *Brown*: "to make a judicial basis for a congenial political conclusion." After all this time, he simply did not "know how to justify the abolition of segregation as a judicial act." Jackson finally stated that he would be willing to join the majority if it acknowledged (as his 1953 term law clerk E. Barrett Prettyman would later describe Jackson's view of it) that the Court was "writing new law for a new day"[346]: Jackson "personally [did] not [have] a problem with desegregation" and "[a]s a political decision, c[ould] go along with it."[347]

Between the two *Brown* merit conferences, Jackson's view that there was not an adequate judicial basis for overturning segregation seems to have ossified. Nonetheless, perhaps sensing that a majority had emerged to invalidate segregation at the 1953 conference, Jackson demonstrated his lack of emotional investment in one outcome or the other by signaling that he could join the desegregationist majority despite his judicial qualms. This flexibility reflects Jackson's character, in the retroactive assessment of Prettyman, as a "very, very, very practical person."[348]

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[345] Of course, and as we have already seen, in the final *Brown* decision Warren would take this very premise, add to it another stating that even though a particular restriction was not foreseen by the Amendment's framers, the Court was not prevented from imposing it, and rule that racial segregation violated equal protection.
[346] Kluger ([1976] 2004, 610).
[347] Hockett (2013, 76).
[348] Fasset et al. (2012, 532).

Though by late 1953 Jackson was prepared to "go along" with desegregation, he had not arrived at that position by the same path as most of his colleagues: Jackson exhibited an emotional profile that was far less responsive to accusations that segregation was unjust and invidious. Furthermore, Jackson's commitment to the judicial process as he understood it had made him wary of constitutional claims that appeared to be motivated by moral zealotry, as were, in his view, the debates surrounding segregation dating back to the mid-1940s. Evidence for this proposition comes from a letter Jackson wrote to his friend, Stanford Law Professor Charles Fairman, three weeks prior to the oral arguments of *Sweatt* and *McLaurin*. The letter, dated March 13, 1950, is worth examining closely.

Jackson began the letter remarking that he was grateful for the opportunity to avail himself of his friend's "researched and informed judgment as to the constitutional questions involved in racial segregation in education." The very next sentence reads: "I am almost embarrassed to be in doubts about a matter on which nearly everyone here seems, one way or the other, to be fully convinced." As the letter will make clear, that shared consensus appears to be the moral offensiveness and unconstitutionality of racial segregation. Jackson explained that he responded differently to racial appeals than the other justices, "perhaps [because of his] background."

> I was brought up in a community where no serious racial problems or tensions existed, attended public school along with a few Negro pupils and never gave it a thought; I cannot remember that it was ever even discussed. I first encountered real racial consciousness and antagonism in Washington, D.C. I am amazed and disappointed at the depth and bitterness of the feeling among the Negroes. The stupidity and recklessness of extremists on both

sides is such that they seem ready to precipitate any kind of conflict. So I find a good deal of demagoguery and hypocrisy on both sides of this issue.[349]

These are not the words one might expect a typical mid-20th Century liberal on the question of race to employ. There is not even a whiff of shame or disgust about whites' historical treatment of blacks, nor are there any pronouncements to the effect that prevailing attitudes among blacks or blacks' peculiar position in American life is at all attributable to white mistreatment. Jackson therefore did not appear to view segregation or whites' treatment of blacks in the North as necessarily immoral or unjust. If he had, we would expect to see him express some level of sympathy with, rather than "amaze[ment]" and "disappoint[ment] at," "the depth and bitterness of the feeling among Negroes." Additionally, Jackson insinuated by juxtaposition that the "real racial consciousness and antagonism" he had observed was mostly, if not exclusively, on the part of blacks. Perhaps most strikingly, he suggested a moral equivalency between segregationists and civil rights activists by declining to temper his accusations of "recklessness," "stupidity," "demagoguery," and "hypocrisy" against one group of "extremists" or the other: Jackson saw both sides as out for blood, seemingly "ready to precipitate any kind of conflict." It may be inferred, therefore, that in the moral passions surrounding the mid-century battle over civil rights that he was called upon to adjudicate, Jackson saw a pervasive and unchecked fanaticism.

Now, Jackson would go on to make a remark that might indicate disapproval of segregation as such, so it should be examined in conjunction with this introductory portion of the letter. Referring to his and Fairman's roles prosecuting the Nazis at Nuremberg, Jackson says: "[y]ou and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with

[349] March 13, 1950 letter from Robert H. Jackson to Charles Fairman. Charles Fairman Papers, South Texas College of Law, Houston. http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll5/id/6. Accessed August 9, 2017.

racial conceits which underlie segregation policies. Neither can we overlook that widely held beliefs and attitudes, even if mistaken, are real factors in law and statecraft and a state of mind may be as real a hazard as a mountain range or a river boundary."[350] It is unlikely that Jackson used "racial hatred" and the "racial conceits which underlie segregation policies" synonymously. After all, if Jackson believed racial hatred undergirded segregation, he could be expected to have expressed himself differently than divulging "amaze[ment]" at the "bitterness of the feeling among Negroes." If Jackson believed that the cause or "undergird[ing]" of segregation is racial hatred, and that racial hatred can produce "terrible consequences," it would presumably be more natural for him to harbor and express "sympathy" for, as opposed to "amaze[ment]" and "disappoint[ment] … at the feeling among," the victims. It is more likely that Jackson viewed the popular attitudes that precipitated and perpetuated segregation of blacks in the United States and the racial hatred directed toward Jews in Nazi Germany as falling in different places along a continuum of more or less odious "racial conceits." But his strikingly unsympathetic attitude toward American blacks strongly suggests that he did not view the pervasive segregation of blacks in America as on par with the systemic persecution and murder of Jews in Europe during the recently concluded war.

Jackson nonetheless recognized the moral energy that the question of race presented by the *McLaurin* and *Sweatt* cases aroused in the other justices. Referring to his fellow Brethren, Jackson proclaimed, "[s]ome have records to live up to, some have records to live down. Some want to see the Administration's hand strengthened politically. In short, nearly everyone *seems under conscious or unconscious emotional commitments of one sort or another*." Jackson, in contrast, stressed his remove from this storm of "conscious or unconscious emotional commitments": "[m]y real concern," he claimed, "insofar as I can read my own feelings, is to see this thing decided

[350] Ibid. Emphasis added.

wisely rather than to see either side win." For Jackson, moderation appeared to be a prerequisite of wisdom, but the heightened passions of the segregationists and civil rights proponents alike, and to some degree of Jackson's own colleagues on the Court, meant that if the justices were to make a wise decision, "the wisdom [was] likely to be a by-product."[351]

Ameliorating the implicit admonition of his judicial colleagues, and highlighting his own struggle to develop a satisfying judicial view of the cases, Jackson continued:

> Perhaps the cause of so much irrationality is the scarcity of satisfactory materials for a rational attitude. The cryptic words of the Fourteenth Amendment solve nothing; three-fourths of a century of judicial interpretation is called in question. Congress itself created a segregated school system in Washington, and the Administration, which denounces segregation, maintains it in the armed forces, Federal Housing, and other agencies.[352]

By asserting that there existed a dearth "of satisfactory materials for a rational attitude," before enumerating the available resources that he might use to come to a decision, all of which point toward affirming *Plessy* and sustaining segregation, Jackson betrayed that as early as March, 1950 he had already begun to put the cart before the horse. Consciously or not, he was by that point viewing race cases before the Court not only in terms of the traditional elements of judicial interpretation, but also through the instrumental lens of whether he could find reasons to "go along" (Jackson's catchphrase throughout the *Brown* decision-making process) with the outcome favored by his fellow brethren, most of whose judgments he evidently saw as being distorted by moral passions. Unless by "rational attitude" Jackson meant one that condemns segregation, there seems to be little reason to conclude that the particular factors Jackson would go on to discuss in his letter

[351] Ibid.
[352] Ibid.

were insufficient to reach a conclusion on the question of whether segregation was constitutional. The problem apparently was that the outcome to which they pointed was unpalatable. In view of Jackson's claim that his "real concern … is to see this thing decided wisely" and that he did not construe the available materials to reach the outcome toward which they appeared to point indicates that he was at least strongly leaning toward the proposition that to affirm *Plessy* was unwise, whether or not Jackson was conscious of his own attitude.

As we have seen from this same letter, Jackson did not exhibit the responses to racial claims that one would expect from a mid-20th Century liberal on the issue of race, so the cause of his evident reticence to affirm *Plessy* was almost certainly not Jackson's personal view of the justice or morality of segregation. The likelier cause was Jackson's position as an outlier among his fellow Brethren, who were apparently of one mind on the matter——at least as the question manifested itself in the context of graduate education. As already discussed, Jackson admitted to being "almost embarrassed to be in doubts" about the constitutionality of segregation in higher education when "nearly everyone here seems, one way or the other, to be fully convinced." Furthermore, over half of the three-page March 13 letter to Fairman is comprised of questions that appear to have been formulated to seek a rationale that would allow Jackson to join his Court colleagues. In framing those questions, he expressed concern that the outcome favored by his colleagues could not be reached constitutionally, and if it could, that the Court should not be the institution to make the decision. Finally, there appears to be no other explanation for Jackson's resistance to going where the judicial evidence pointed than a desire to maintain unanimity with the other justices, and not to be locked out in the cold. If true, this would suggest that the social intuitionist model operated on Jackson by means of group polarization——by a desire to be persuaded, on a judicial basis, to go along with the conclusion on which his fellows "seem[ed] … fully convinced." In this narrow

respect——that his reasoning was motivated by a personal desire severable from his usual judicial approach——Jackson's behavior parallels Frankfurter's, although the "non-judicial" personal desires mediating each justice's decision-making were different. Frankfurter's desire was to reach a moral result; Jackson's was to "go along" with his judicial peers, to be seen by his colleagues and friends (including Fairman) as behaving respectably. Both men sought to reconcile their respective motivations with the parallel, but slightly weaker, motivation to preserve a clean judicial conscience.

That the evidence available to Jackson indeed pointed toward affirming *Plessy*, and that Jackson apparently thought so, is confirmed in follow-up letter Jackson composed to Fairman on April 5. There, Jackson asked his friend:

> Have you read the [*Sweatt v. Painter*] Texas brief? It makes the most complete review of historical materials, including a good many citations to your own work.[353] I have not yet read it with care, but, so far as it could be developed in the argument, they seem to have established pretty clearly, first, that there was no intention on the part of most of the proponents of the Fourteenth Amendment to interfere with the state school systems on the question of segregation; secondly, that even those who wanted to see that accomplished acknowledged that it was not accomplished by the Amendment or the civil rights legislation. So our question becomes a little more than whether we will fill gaps or construe the Amendment to include matters which were unconsidered. It really becomes whether we

[353] Fairman was an influential scholar, among other things, of the Fourteenth Amendment and its history, and his work on the Amendment was later cited extensively by Justice Frankfurter in the incorporation debate with Justice Black in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and by Justice Harlan in another chapter of that debate with Justice Black in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

> will construe it to include what was deliberately and intentionally excluded. This is assuming that my superficial impressions of the legislative history are correct.[354]

The last three sentences are especially revealing of Jackson's state of mind on the constitutionality of segregation in 1950. He first stated that the question before the Court is "whether we will fill gaps or construe the Amendment to include matters which were unconsidered." This framing is of course unhospitable to the NAACP's case: "fill[ing] the gaps" corresponds to sustaining segregation, "construe[ing] the Amendment to include matters which were unconsidered" to invalidating it. Rethinking this formulation and further extending it in the direction in which it first pointed, Jackson then declared that the question "really becomes whether we will construe [the Amendment] to include what was deliberately and intentionally excluded." This phrasing reflects an extremely unsympathetic *judicial* attitude toward the NAACP's constitutional arguments in the university segregation cases, whatever Jackson's moral stance toward segregation might have been. Moreover, the comments indicate that by April of 1950 Jackson had accepted, albeit somewhat tentatively, that the legislative history of the Fourteenth Amendment could not provide a judicial basis for invalidating segregation. Finally, that Jackson's "superficial impressions of the legislative history" in the spring of 1950 were indeed borne out by subsequent investigation is confirmed by his pronouncement at the 1952 *Brown* conference that "nothing in the text" of the Constitution, "nothing in the opinions of the courts," and "nothing in the history of the 14th Amendment" persuaded him that segregation was unconstitutional.

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[354] April 5, 1950 letter from Robert H. Jackson to Charles Fairman. Charles Fairman Papers, South Texas College of Law, Houston. http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll5/id/9. Accessed August 9, 2017.

Of course, the NAACP (with a substantial assist from Alexander Bickel) succeeded in neutralizing the Amendment's unsupportive history during the *Brown* reargument in 1953 by convincing those justices who were already temperamentally predisposed to lend a helping judicial hand to an oppressed and unfairly maligned minority that the history either unequivocally supported invalidating segregation (as Warren, Black, Burton, and Minton were convinced) or, in the final analysis, failed to present an insurmountable obstacle to reaching a desirable moral conclusion (as Frankfurter and Clark came to believe). Persuading the Court of the latter proposition, in particular, was Thurgood Marshall's stated goal. During the "six-month summer"[355] of 1953, when the NAACP legal research team was feverishly composing the organization's reargument briefs, Marshall would frequently remind his staff that its objective was to create the appearance of a historical stalemate in the justices' minds. "A nothin'-to-nothin' score means we win the ball game," Marshall said.[356] The history, in other words, could only hurt the NAACP; but if it could be somehow be neutralized, Marshall anticipated that a majority of the nine "white bosses," who, he would jokingly tell his legal team, could "do *any*thing [they] want, 'cause [they] got de power!"[357] would do precisely what they wanted to in their heart of hearts: the right thing. Lead historian Alfred Kelly, who in the home stretch of November, 1953, returned to the organization's Manhattan office from Detroit to superintend the recrafting of the NAACP brief on the Amendment's history, later recounted to Kluger:

> I am very much afraid that … [during those sessions] I ceased to function as a historian and instead took up the practice of law without a license. The problem we faced was not the historian's discovery of the truth, the whole truth, and nothing but the truth; the problem

[355] Kluger ([1976] 2004, 620-659) has a chapter on it.
[356] Id., at 622.
[357] Id., at 646.

> instead was the formulation of an adequate gloss on the fateful historical events of 1866 sufficient to convince the Court that we had something of an historical case…. It is not that we were engaged in formulating lies; there was nothing as crude and naïve as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts in a way to do what Marshall said we had to——"get by those boys down there."

To this Kluger adds, "[a]nd yet Kelly would become increasingly convinced with the passing years that the last-minute interpretation he came up with on the two sorest points in the historical evidence was essentially the correct one." But John Kelly the historian, not the partisan, was apparently not so persuaded when the moral and constitutional positions in the service of which his historical theory was advanced had not yet gained the overwhelming and near-universal acceptance they would in *Brown*'s wake. Nothing succeeds like success.

Jackson appeared to detect the motivated nature of historical theories presented in adversarial contexts, especially those of extraordinary political salience, and approached such claims skeptically. After reading a draft version of what would eventually become Fairman's influential Stanford Law Review article, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,"[358] on October 18, 1949, Jackson wrote his friend:

> I think you have done a great service to the legal profession, not only in bringing to light the real facts about the Fourteenth Amendment but in demonstrating the danger of going into history to reconstruct past attitudes as a basis for changing the constitutional doctrine. I am one who believes that we have gone too far in going into legislative history to clear up ambiguities which we sometime go to legislative history to create. It is even more

[358] October 18, 1949 letter from Robert H. Jackson to Charles Fairman. Charles Fairman Papers, South Texas College of Law, Houston. http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll5/id/1. Accessed August 9, 2017.

> treacherous ground in constitutional matters, as you have so well demonstrated. While I would not want to say that we should never take into account legislative history or the history of the time, it is certainly a path to tread with care.[359]

Jackson stressed that the Court should examine with special wariness litigants' use not of legislative history per se, but of legislative history wielded to serve "as a basis for changing the constitutional doctrine." The reasons for this, though unstated by the justice, would appear to be relatively straightforward: legislative history that tends to confirm an existing constitutional understanding need not be scrutinized to the same degree as legislative history dug up and brandished by parties seeking to overturn that consensus because 1) it is unlikely that previous courts grievously erred in interpreting the history of a legislative act to which they were closer in time, and 2) implementing constitutional change tends to be politically costly for the Court and legally expensive for everyone else, while sustaining precedent is expected, uncontroversial, and inexpensive. Perhaps more important for Jackson, though, is the point that legislative history appears to be the refuge of the desperate. Jackson's curious locution that the Court has gone "into legislative history to clear up ambiguities which we sometime go to legislative history to create" suggests the justice believed that such excursions are often recursive and instrumental. The fruit of motivated inquiries into history will be as trustworthy as they are neutral.

Jackson discounted much of the *Sweatt* and *McLaurin* litigants' arguments due to their putatively non-judicial nature. Returning to the aforementioned letter to Charles Fairman of April 5, 1950, Jackson remarked of the *McLaurin* and *Sweatt* oral arguments:

> We have survived two days of argument on the segregation issue in which all parties seemed to vie with each other in enlisting pressure groups and giving the whole thing a

[359] Ibid.

> general atmosphere of politics, which was especially emphasized by the appearance of the Attorney General, who added nothing except to get into a position to capitalized any advantages for the administration. The argument has not been very enlightening on the points that trouble me.

Those points were enumerated in the second half of his March 13, 1950 letter to Fairman, the first half of which has already been canvassed. In the letter's latter two-thirds, Jackson described the NAACP's litigation strategy, evidently based solely on its briefs, as "advanc[ing] arguments as to the general philosophy of the Amendment, the inherent offensiveness of compulsory segregation and the general duty of the Court to outlaw evil and advance democracy and equality." Jackson followed this rather blunt summary with a list of eight questions, which he described as ones "on which I am both perplexed and as yet open-minded and, incidentally, on which I don't expect very substantial help from either side in the argument nor from the score of amici who are volunteering advice." That he described the NAACP's efforts in this way, and sought his friend's input in answering his own questions, indicates that the latitudinarian reading of the Fourteenth Amendment and appeals to conscience and judicial duty in the NAACP's *Sweatt* and *McLaurin* briefs failed, in Jackson's view, to amount to a genuine judicial case for overturning segregation in higher education. Thus, Jackson not only was unreceptive to the NAACP's interpretation of the Fourteenth Amendment but was also apparently unmoved by the moral appeals the NAACP made, even when such were couched in the language of judicial duty.

Nevertheless, something over the course of the *Sweatt* and *McLaurin* arguments must have changed Jackson's mind. Clark's notes reveal that at the customary Saturday judicial conference after the cases were argued, Jackson expressed a desire to reverse the lower Courts that had applied *Plessy* but also asserted that the legislative history of the Fourteenth Amendment could not be

invoked in the appellants' cause. Speaking after Douglas, who had announced his support for holding *Plessy* inapplicable to higher education, Jackson stated, "14th Amendment history leaves you without support" (by "you" he seemed to be referring to all those who had by that point spoken in favor of overturning segregation at the public university level.) "Congress has not touched it. In effect we are amending the Constitution." Then, after predicting some of the likely public reaction in the Deep South, he rather paradoxically proclaimed, "Desirable to do it (reverse)[.] My views are fluid enough to join any theory."[360]

Given Jackson's imperviousness to the NAACP's briefs and oral arguments in the university segregation cases, and his recurring insistence on discovering a "judicial basis" for any decision in the cases, what could have convinced Jackson that it was "[d]esirable" for the Court to "amend[] the Constitution"? It is impossible to say with absolute certainty, but Fairman's March 30 reply to Jackson's letter of March 13, in which Jackson had asked for Fairman's thoughts on eight questions concerning the cases, suggests an answer. In the letter Fairman began by pronouncing on the "conditioning factor" that one's "personal background" plays in approaching a constitutional question. After giving a synopsis of his own limited personal history with blacks and segregation, he declared: "I respect Charles Sumner, but admire far more Abraham Lincoln. That is, I seem to want to line up with the men who, while identifying the distant goal, work in their own time to achieve the substantial advances that are presently obtainable. So much for disclosure of personal point of view."[361] To answer Jackson's questions in the March 13 letter, Fairman next delved into the history of the Fourteenth Amendment. He said he had "never scanned the history

[360] Tom C. Clark Papers, Box A2. Tarlton Law Library, The University of Texas at Austin.
[361] March 30, 1950 letter from Charles Fairman to Robert H. Jackson. Charles Fairman Papers, South Texas College of Law, Houston. http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll5/id/7. Accessed August 9, 2017.

of the Fourteenth Amendment or of congressional action during Reconstruction with an eye specifically directed at the matter of segregation," but "[m]y impression is that in 1866-1868 'Equality' did not have an accepted meaning that excluded segregation."

> When the Negroes in the South had so little, so nearly nothing, when it would have been a notable achievement to ensure them the enjoyment of even the most elementary rights, the issues now before the Court may well have remained unanswered if indeed they were considered. It seems to me that the men who carried the Amendment evidently regarded it as applying its leverage almost wholly upon the South. If the Northerners felt that thenceforth they too must search their souls and mend their ways, that thought has eluded me.

If true, this would belie the periodic references, throughout the *Brown* decision-making process, to racial segregation as a *national* problem, albeit one whose peculiar rootedness in the South would likely precipitate the fiercest resistance from that quarter. Fairman then highlighted what he evidently viewed as a contradiction at the heart of *Plessy*. Rationalizing racial segregation, *Plessy*'s author, Justice Henry Brown, wrote that "distinctions based upon color were 'in the nature of things.'" But "[p]ut beside this," Fairman implored, "his remarks in *Holden v. Hardy*[362] in 1898: 'the law is, to a certain extent, a progressive science ...;' methods once 'deemed essential' may be 'found to be no longer necessary,'" and "'while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuations." Surveying this contrast, Fairman wrote, "I believe that the issue of segregation should be worked out, not as a problem in the history of 1866-1868, but as one more instance of the progressive search for more equal justice."

[362] 169 U.S. 366 (1898).

Fairman then addressed himself directly to Jackson's concern, expressed in question one of the March 13 letter, that the Court's role should be circumscribed with respect to social legislation regarding race, just as it eventually became regarding social legislation touching upon national economic stewardship. In that letter, the first and most extensively annotated question Jackson submitted to Fairman reads as follows:

> 1. What is the function of the Court in this matter? I am clear that I would support the constitutionality of almost any Congressional Act that prohibited segregation in education. The only place Congress has acted, i.e., the District of Columbia, it has gone the other way.) But I really did, and still do believe the doctrine on which the Roosevelt fight against the old Court was based – in part, that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs. We insisted that a majority out of nine appointed life-tenure men should not settle such issues…. I find a good many who were associated in that fight now abandon that position but think the Court should decide such questions, provided it will decide their way. The problem in my mind is not merely should we nine decide this case, but should such an institution decide such questions for the Nation.

Fairman, in his reply letter of March 30, responded:

> It seems to me that the question of unequal treatment of members of a racial minority is not to be bracketed with the matters of economic and social policy on which the old [pre-*West Coast Hotel Co. v. Parrish*[363]] Court made unwarranted and unwise pronouncements in the years prior to 1937. Whether bakers were limited to 60

[363] 300 U.S. 379 (1937).

> hours per week, whether Tysons were limited to a write-up of 50 cents, etc. – these were questions on which the justices never had any business to pronounce. . . . Unequal treatment of a racial minority in a matter of public right seems to me a very different thing. Unlike questions of collectivism vs. laissez faire, there seems to me to be a right and a wrong side in the *Sweatt* and *Henderson* cases.[364]

Fairman then pointed out that the plight of racial minorities seeking fair treatment from the majority is not analogous to that of a litigant attempting to "arouse the public on a matter of common interest," where the abuse would stand a good chance of being corrected. Abstaining from further elaboration upon this line of thought, Fairman nonetheless continued: "Woodrow Wilson had a phrase, 'I'm not arguing with you, I'm telling you.' The Negro, it seems to me, may take the same position in claiming truly equal treatment. He should not be remitted to persuasion and to the slow process of evolution of Southern sentiment for a recognition of his claim to equal right." Fairman, evincing evidence of intuitive moral judgment of his own, then explained how he reached this conclusion:

> The Negro hopes to establish the proposition that no segregated treatment can be fully "equal". In thinking about these current cases I have come to believe that this proposition will sooner or later become the law of the Constitution, because I believe it is true and will become recognized as true. I am a good deal impressed by what I read on this point in the briefs – Brief for the United States in *Henderson* case, 35 ff; Brief for petitioner in *Sweatt* case, 26ff; Brief for appellant in *McLaurin* case, 24 ff – not for any "authority" there found

[364] March 30, 1950 letter from Charles Fairman to Robert H. Jackson. Charles Fairman Papers, South Texas College of Law, Houston. http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll5/id/7. Accessed August 9, 2017.

but because as I read it, I think, This must be true. (My general reading is pretty limited, so I have never looked at Myrdal and the rest.)

The gist of the brief selections to which Fairman alluded is that segregation is inherently unequal. For instance, the brief for the United States in *Henderson* states in part: "When colored passengers are furnished dining car service only at a table partially screened off as a symbol and token of their separate and inferior status, the segregation is open, explicit, and humiliating."[365] Perhaps more "impress[ive]" to Fairman, the brief reasons as follows:

> [T]he present case comes within an exception to the "separate but equal" doctrine stated or plainly indicated in the *Plessy* opinion. The Court there said (pg. 544) that laws requiring the separation of the white and colored races "do not *necessarily* imply the inferiority of either race to the other" (italics supplied). In other words, if the separation required did imply the inferiority of one race, the accommodations would be "separate" but they would not be "equal." While the *Plessy* case held that enforced separation is not in and of itself inequality, it did not hold that as a matter of law, similar but separate physical accommodations are always equal. And if the question is one of fact, the facts of the present case establish beyond all doubt that the segregation which is enforced here is the antithesis of equality (*supra*, pp. 28-34).[366]

This is the best conceivable reconciliation of *Plessy* with a judicial finding that segregation violates the Fourteenth Amendment. Had it been appropriated by the Court in *Brown*, it would have

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[365] Brief for the United States in *Henderson v. United States*, at 38. U.S. Supreme Court Records and Briefs, 1832-1978. Gale, Cengage Learning. University of Texas at Austin - Law. Available at http://0-galenet.galegroup.com.tal-lons.law.utexas.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW101643906. Accessed August 14, 2017.
[366] Id., at 40.

achieved Warren's aim of not acknowledging that the effective or functional way in which *Plessy* was understood——as categorically blessing segregation——was being overthrown while preserving a much closer and therefore more defensible continuity with precedent than the Court ultimately did. In other words, relative to the reasoning employed in the ultimate *Brown* decision, this rationale would have stated the Court's case——that segregation *in fact* almost always symbolizes and perpetuates inequality——more directly, perspicaciously, and convincingly, while shielding the Court from criticism that it was behaving lawlessly by overturning 58 years of precedent. That none of the justices apparently recalled this element of the government's brief in *Henderson* when Warren asked for their feedback on his *Brown* drafts likely detracted from the decision's overall effectiveness.

Page 26 of the petitioners' brief in *Sweatt* opens with the heading, "4. State ordained segregation is a particularly invidious policy which needlessly penalizes Negroes, demoralizes whites and tends to disrupt our democratic institutions." The first sentence of the section reads: "If the racial factor has no scientific basis, then the ills suffered as a result of racial segregation are particularly invidious."[367] This opening line depends upon and must be understood in the context of section 3. Commencing just two pages prior to Fairman's citation, section 3 reported the social scientific consensus of 1950 that "differences in intellectual capacity or in ability to learn have not been shown to exist as between Negroes and whites, and … the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice." On the basis of this consensus, the NAACP's lawyers in section 3 wrote that "[t]he racist premise [that there are inherent differences between the races] is completely invalid,

[367] Brief for Petitioners in *Sweatt v. Painter*, at 26. U.S. Supreme Court Records and Briefs, 1832-1978. Gale, Cengage Learning. University of Texas at Austin - Law. Available at http://0-galenet.galegroup.com.tallons.law.utexas.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW102518851. Accessed August 14, 2017.

and no act of segregation based upon it can be upheld as reasonable."[368] Accordingly, although Fairman did not in his March 30 letter reference the social scientific evidence of section 3 indicating that there are no appreciable differences between races, what particularly "impress[ed]" Fairman was highly contingent upon that finding.

Section 4 proffers more empirical claims: "no child at birth possesses either an instinct or even a propensity toward feelings of prejudice or superiority," and such "prejudices, when and if they do appear, are but reflections of the attitudes and institutional ideas evidenced by the adults about him." Imputing the cause of the prejudices to segregation itself, the brief then asserts that "the very act of segregation tends to crystallize and perpetuate group isolation, and serves, therefore, as a breeding ground for unhealthy attitudes."[369] The atmosphere created by segregation, in turn, "accentuate[s] imagined differences between Negroes and whites," affording such differences "an appearance of reality." Next, the brief repeats the tact adopted in *Henderson*: "Qualified educators, social scientists, and other experts have expressed their realization of the fact that 'separate' is irreconcilable with 'equality.' There can be no equality since the very fact of segregation establishes a feeling of humiliation and deprivation to the group considered inferior."[370] Finally, section 4 alleges that segregation actually harms whites. Quoting Gunnar Myrdal's *American Dilemma*,[371] mid-century American liberalism's social scientific Bible on race, the brief proclaims: "the low economic, political, legal, and moral standards of Southern whites" are "kept low because of discrimination against Negroes and because of obsession with the Negro problem. Even the ambition of Southern whites is stifled partly because, without rising far, it is so easy to remain

[368] Id., at 24.
[369] Id., at 26.
[370] Id., at 27.
[371] Myrdal (1944).

'superior' to the held-down Negroes."[372] The appellant's brief in *McLaurin* is substantially similar to section 4 of the petitioner's brief in *Sweatt*, just examined. The organization and content are virtually identical.[373]

Now it is unclear whether the briefs to which Fairman called Jackson's attention exerted the same impression on Jackson as they did on Fairman, or even whether Jackson ever read (or re-read) them at Fairman's prompting. But it is safe to say that Fairman appeared to be powerfully convinced by the NAACP briefs' claims that segregation was unjust and immoral, for blacks and whites alike, and that he hoped Jackson might be similarly swayed. Jackson's acceptance, at Fairman's exhortation, of the validity of the social science findings presented in the briefs, and of the intended moral implications of those findings, would certainly explain his clear-eyed acknowledgment at the *Sweatt* and *McLaurin* conference that the Court would be "amending the Constitution" in overturning segregation in higher education, but that it was nevertheless "desirable" for them to do so. But it would not explain the much greater difficulty Jackson encountered in disposing of *Brown*, though he readily conceded at the *Brown* conferences that he was perfectly willing to write "new law for a new day." The factors that distinguish *Brown* from *Sweatt*, *McLaurin*, and *Henderson* are the sheer magnitude of the judicial undertaking, the attendant problems of enforcement, and the impossibility of plausibly contending that in striking down segregation at the public-school level, the Court was not indeed overruling *Plessy* in toto. Some of these factors would logically have to account for the starkly different attitude Jackson exhibited toward the judicial questions with which he grappled in attempting to craft a concurrence in *Brown*.

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[372] Id., at 28.

[373] Brief for Appellant in *McLaurin v. Oklahoma State Regents for Higher Education*, at 26-30. U.S. Supreme Court Records and Briefs, 1832-1978. Gale, Cengage Learning. University of Texas at Austin - Law. Available at http://0-galenet.galegroup.com.tallons.law.utexas.edu/servlet/SCRB?uid=0&srchtp=a&ste=14&rcn=DW102770096. Accessed August 14, 2017.

ROBERT JACKSON'S BROWN MEMOS

The best insights we can glean into Jackson's views on the questions posed in *Brown* come from three drafts of a memo he developed during January, February, and March of 1954.[374] Titled and structured as memoranda to the conference (that is, for the justices' eyes and internal use only), the documents evince Jackson's judicial instincts, personal attitudes toward race and desegregation, and the clearly motivated nature and evolution of his case for declaring segregation unconstitutional. These documents are by far the most revealing and extensive evidence of these factors for any of the justices, with the exception of perhaps only Frankfurter. They are accordingly worth examining in some detail. For intelligibility and ease of digestion, I will examine these documents in side-by-side fashion, focusing on parallel sections from each, summarizing their contents in discrete chunks, and noting changes in wording or meaning over the course of the three drafts on any given section or idea. The three memoranda are dated January 6 (hereafter "Draft 1"), February 15 ("Draft 2"), and March 1 ("Draft 3"), 1954.[375] They are 14, 15, and 23 pages in length, respectively. For future scholarly examination and research, verbatim transcriptions of the three drafts are reproduced in the Appendix to this work.[376]

"Since the close of the Civil War the United States has been 'hesitating between two worlds – one dead – the other powerless to be born'." So begins each version of the Jackson *Brown* memos. This epigraph evocatively captures the dual struggles that transpired in its author and the country of which he wrote: in Jackson, of attempting to reconcile legalism with an instrumental

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[374] All memos are drawn from the Robert H. Jackson Papers, Box 184, Folder 8, Library of Congress.
[375] Jackson produced a fourth and final draft, dated March 15, whose content is substantially similar to the third draft (dated March 1) and differs from its immediate predecessor primarily in organization, not content, diction, tone, or emphasis. In the interest of making the examination of the drafts manageable in a single chapter, I have elected to examine the first three drafts only. A correspondence map that traces the connections between the third and fourth drafts follows at fn 399, *infra*.
[376] See Appendix, at pg.336, *infra*.

approach to judicial outcome, and in the United States, of "conform[ing] its racial practices to its professions."

Echoing his March 13, 1950 letter to Fairman concerning the *Sweatt* and *McLaurin* cases, Jackson framed the first and third *Brown* drafts by forthrightly acknowledging his personal background and how it mediated his instincts in the matters of race and enforced segregation. "I must admit to little personal experience or firsthand knowledge by which to test many of the arguments advanced in these cases," Jackson conceded in the first draft. "One reared in the North and attending public schools where not even a thought was given to segregating the very few negro pupils, finds it difficult to understand the emotional and traditional background of the present problem." The analogous portion of the second draft, though transplanted to the second page of the memo from the first in the first and third drafts, is substantially similar.

However, in the third draft, Jackson embellished his personal framing of the memo with a comment that appears later in the two earlier drafts, on page 3 of each. This comment, and its elevation to the introductory framing of the entire opinion, lift the veil on both Jackson's personal opinion and judicial technique, albeit the latter inadvertently.

> As one whose formative years were spent in the public schools in a part of the North where Negro pupils were very few and not even a thought was given to segregating them, *I suppose I am predisposed to the conclusion that Negro segregation in the schools in most parts of the country at least has outlived whatever justification it may have had. Economic, social and political considerations, which prevented it from gaining a foothold in some parts of the North, seem to mark it for certain and early extinction elsewhere. That within a generation it will also be outlawed by Constitutional interpretation, whatever we may say today, also appears certain. As the forces of mortality and replacement operate on this bench, it*

seems certain that the political forces represented by the Executive branch rather than the inertia represented by the Congressional branch of the government will eventually make itself felt in law.[377]

The revision of the sentence attributing its author's ignorance to his limited personal experience with race and segregation to a statement pronouncing his conclusion that enforced racial segregation is no longer justified suggests that Jackson performed at least some of his revisions with an eye to strengthening the case for invalidating racial segregation.

In the earlier drafts, Jackson included prefatory language that he omitted in the third. In draft one, the first sentence is, "The conclusion that negro segregation in schools has outlived whatever justification it ever had and is incompatible with our current conception of equality before the law, is congenial to my own background and views of fair and wise public policy." The second draft likewise reads, "That Negro segregation in the schools has outlived whatever original justification it may have had and is no longer wise or fair public policy is a conclusion congenial to my background and social and political views." Jackson revised these sentences in the third draft, evidently to mute his prior admission that ending segregation was consonant with his personal "social and political views," and to highlight instead the evolving American social and moral landscape. In fairness, this revision is likely a truer description of the forces impelling Jackson's decision-making: from Jackson's vantage point, it is not so much that segregation's injustice made it unconstitutional, but that the abhorrence with which segregation was viewed by elites and increasing proportions of the public made a finding of segregation's unconstitutionality all but inexorable. Fairman, after all, had given him fair notice.

[377] Italics supplied to designate language relocated from a later position in the first two drafts to an earlier position in the third draft.

So here, in the second paragraph of the third draft, is immediate evidence of the most noticeable pattern weaving its way through the Jackson *Brown* memo drafts: all revisions serve to strengthen the case Jackson sought to make for invalidating racial segregation and tasking Congress with enforcement legislation. By relocating these later comments in the first and second drafts to the crucial opening framing of the third, Jackson emphasized the centrality of the futility of resisting segregation's abolition to his "judicial" case for invalidating the practice. In a way, Jackson appeared to signal that his hand had been forced. He indicated he was convinced not by a constitutional theory, but by the facts (1) that segregation was imploding, and would soon be widely recognized as immoral and unjust, even absent action by the country's courts or legislatures to hasten the system's demise; (2) that this secular evolution in views would induce the Supreme Court eventually to overturn segregation, regardless of whether it could muster what Jackson regarded as a strictly judicial basis for doing so; and (3) that national legislation would at some point address segregation and attendant social problems. Though the predictions were, as far as predictions go, extremely accurate——(1) and (3) came true, and (2), though in hindsight a historical counterfactual, would have almost certainly come true had the Court gone the other way than it actually did in 1954——they were not, strictly speaking, germane to the development of Jackson's judicial case for the "congenial political conclusion" toward which he was groping. Rather, from the perspective of Jackson's usual judicial approach, the predictions are distractors, apparently intended not to persuade an eventual audience but to ease the justice's conscience by demoting the salience of the underlying task——reaching the outcome by means of defensible judicial reasoning. With these "elevated" lines in his third draft, Jackson was not so much resolving his interpretive conundrum as convincing himself that the outcome was a foregone conclusion, regardless of what he decided or said. In light of what we have already seen about Jackson's judicial views toward

overturning segregation, these lines from Jackson's memos seem to implore, Why stand athwart history when one can join in shaping it?

Shaping it, indeed, were the evolving forces of moral opinion——and these apparently operated just as much on the author of these drafts as on the broader society whose views Jackson felt such pressure to vindicate in his judicial role. After his first page framing in Draft 3, on page 2 Jackson inserted a new sentence to provide a segue to his subsequent ruminations, appearing in all three drafts, on the ubiquity of "separatism" in human groups. That sentence reads: "These would be simple cases if they could be decided by a mere expression of our personal opinion that school segregation is morally, economically intellectually or even legally indefensible." But, Jackson argued implicitly, *that* is not what comprised the basis of his own decision that segregation is unconstitutional. As we will see, the basis for that conclusion was a "change in the Negro population" itself, which rendered segregation "morally, economically intellectually or even legally indefensible." For now, however, Jackson continued in a parallel vein in all three drafts by contending that the impetus for racial segregation was an "instinct" most human groups experience and institutionalize through some form of imposed separation:

> It seems instinctive with every race, faith, state or culture to resort to some isolating device to protect and perpetuate those qualities, real or fancied, which it particularly values in itself. Separatism, either by voluntary withdrawal or by imposed segregation, has been practiced in some degree by many religions, nationalities, and races and by many – one almost can say all – governments to alleviate tensions, prevent subversions, and to quell or forestall violence.

Jackson's unapologetic expression of this sentiment corroborates the impression, suggested above, that Jackson was not a liberal on the question of race. He apparently was not abreast of, and had

not imbibed, theoretical and empirical developments emanating from academia (e.g., most famously, Myrdal's *An American Dilemma*[378]) ; he was skeptical both of the relevance to the judicial process and accuracy of the sociological data proffered by the NAACP; he did not view American race relations through the Manichean prism born of that very period in the middle of the last century that located the misfortunes of African Americans squarely in white racism and mistreatment; he believed there were "extremists on both sides"; and, abjuring the unequivocal civil rights moral righteousness he construed to be zealotry, Jackson preferred to chart a course of compromise, to see cases touching upon race "decided wisely rather than [] see either side win." The opinion, expressed in all three drafts of his *Brown* memos, that racial segregation was a manifestation of a normal or at least ubiquitous human political instinct does not prove that Jackson harbored any "sympathy with racial conceits which underlie segregation policies" (a proposition he expressly disclaimed in his March 13, 1950 letter to Fairman), but it does suggest he did not view that instinct as simply evil or malicious. On the contrary, Jackson claimed to believe that separatism is motivated by a positive or affirmative human instinct to "protect and perpetuate," over and against the diluting or deleterious influences of other groups, "those qualities, real or fancied, which it particularly values in itself."

Though he does not say so explicitly in his *Brown* memos, it is probable that Jackson thought that instinctual tendency to "protect and perpetuate" a people's identity through separation is not necessarily malicious but that its actualization in practices such as racial discrimination might be. This proposition would square Jackson's vote in *Korematsu* and his later allusion to that case in the third draft of his *Brown* memo (stating that the Court had failed to do "simple justice

[378] Myrdal (1944).

to the [Japanese American victims]" of wartime internment) with his repeated statements that racial discrimination was offensive and his own practices of not *moralizing* his view of that discrimination and thereby managing to retain some emotional distance on it. This attitude of emotional distance or dispassion, and the view that segregation, though baneful, might be motivated by a human instinct if not honorable then at least respectable distinguish him from those justices——Warren, Black, Douglas, and to a lesser extent, Burton and Minton——who expressed the conviction that segregation was rooted in and defensible only according to the supposition of white supremacy or black inferiority, i.e., animus.

Jackson followed his ruminations on separatism with two other comments worthy of special note. The first points to limits on the judiciary's capacity to effect social change: "This Court can not eradicate these fears, prides and prejudices on which segregation rests." Any judicial victory would be fleeting: alone, the judiciary can treat only the symptoms, not the causes, of enforced segregation. The second comment clarifies that those causes are not merely regional in prevalence, but national: "[e]ven in the North these [attitudinal factors on which segregation rests] are latent and while they may not manifest themselves in legal discriminations, they do by outbreaks of racial rioting." This explicit mention of race riots appears only in the second draft. In the first, Jackson said "they have been made manifest by outbreaks of violence rather more extensive than have occurred in the South," and in the third, he omitted the reference entirely. Despite the fact that Jackson culled this line from his third and final versions, its presence in the first two evince that he viewed racism as a social problem of national scope. In fine, Jackson expressed skepticism about the Court's capacity to reform the popular racial attitudes on which segregation rested, since such action was, in Jackson's view, a necessary condition of truly uprooting the practice.

Jackson next situated the meaning of segregation in the context of the "great white American conflict."

> But in the South the negro not only suffers from racial suspicions and antagonisms present in other states and in other countries of the world, but also, I am convinced, has suffered great prejudice from the aftermath of the great American white conflict. The negro and his champions may justly resent the forces by which he has been held in subjection. But the white South retains in historical memory a deep resentment of the forces which, by conquest, imposed a fierce program of reconstruction and the deep humiliation of carpetbag government. The negro is the visible and reachable beneficiary and symbol of this unhappy experience. Thus, in the southern states he has not only to bear his own disadvantages but the burden engendered by white wars and the hostilities of white politics.[379]

Jackson appeared yet again to demonstrate less righteous indignation, and more dispassion and, therefore, accuracy, than his fellow Brethren in contemplating the South's motives for instituting segregation. Not satisfied merely with imputing the South's behavior to irrational animus, Jackson instead stated that the South viewed its black population as a symbol its defeat and humiliation in a war with its Northern counterpart, which, as the more poorly reconstructed elements of the South might claim, forced it to remain in an unhappy marriage. If this view is not counter-productive, Jackson suggested, then it is at least understandable——and must be understood if the Court is to have any chance of success in revamping Southern mores. Perhaps most importantly, and as a subtle warning to those Northerners champing at the bit for social reform in another region of the country, Jackson observed that the South was acutely sensitive to its recent history of being conquered in a "white war[]" as a consequence of "the hostilities of white politics." The justice implied

[379] Draft 1.

that intervention by a national institution (which as a national and not a state institution would be invariably received in the South as a symbol of the North) in an area of life the South had long regarded (and was long led to regard by the Court) as a matter of state discretion and about which the South exhibited an unusual degree of defensiveness owing to "the emotional and traditional background which complicate" it, may begin yet another chapter in that history of "white wars." It was a warning——a psychological diagnosis, really——that none of the Court's Southerners expressed among their predictions of resistance to judicial desegregation, and it is true that Jackson only hinted at the warning in his memo, which he never distributed generally to the conference. With the benefit of hindsight, however, Jackson's pronouncements captured a critical element of Southern psychology that the Court, in implementing desegregation, might have benefited enormously from identifying and understanding. However, it must be acknowledged that the remarks' true thrust——like that of most of Jackson's others in the draft memos——counseled judicial nonintervention. It is in struggling to overcome the preponderance of observations pointing to that outcome that we see the unusual and motivated character of Jackson's effort to talk himself into going along with the emergent *Brown* majority.

Here, the third draft diverges appreciably from the first and second. The third transplants the discussion that occurs in the first two to a much later section of the memo and replaces it with a remark that originally appears later in the first and second drafts. Because the remark that the third draft moves up appears in a context in previous drafts that seems to be more revealing of the sentiments that produced it, I will consider that remark in the location at which it appears in the first two iterations. However, to mark this comment for future discussion, here is how it appears in Draft 3:

> If we should regard the feelings and reactions of those who are coerced into segregation, I suppose we should also weigh the psychological effect on those who are coerced out of it. While the pro-segregation emotion may seem to us less rational than anti-segregation emotion, we can hardly deny the sincerity and passion of those who think that their blood, birth and lineage are something worthy of protection by separatism.

All three drafts, finally, conclude section one of the memo with a warning that the judicial case for invalidating segregation suffers from certain "difficulties" that the Court should frankly address. Draft 1 rather succinctly reads: "But since it bears importantly upon the form and expedition of the relief, this Court must face the difficulties in the way of honestly saying that the states which have segregated schools have not, until today, been justified in regarding their practice as lawful." Draft 2 expounds upon this thought further.

> But we can not oversimplify this decision to be a mere expression of our personal opinion that school segregation is unwise or evil. We have not been chosen as legislators but as judges. Questions of method and standards of constitutional interpretation and of limitation on responsible use of judicial power in our federal system are as far reaching as any that have been before the Court since its establishment. *This Court must face the difficulties in the way of honestly saying that the states which have segregated schools have not, until today, been justified in regarding their practice as lawful.*[380] And the thoughtful layman, as well as the trained lawyer, must wonder how it is that a supposedly stable organic law of our nation this morning forbids what for three quarters of a century it has allowed. I

[380] Italics added to indicate original statement of Draft 1.

> think we individual justices may not, in justice to this Court as an institution and to our profession, brush off these problems.

Like Frankfurter, Jackson understood his judicial role to impose a formal, which is not to say strict, separation between his private moral views and his interpretation of constitutional law. He also recognized that the biggest judicial obstacle to the conclusion the Court was trying to reach in *Brown* was precedent. But these comments illustrate that Jackson's concern for precedent went far beyond a formulaic or habitual adherence to *stare decisis*. The problem for Jackson was not so much that the Court could not change its mind; it is that the Court required especially compelling reasons for doing so when its decisions had blessed, and their long duration had invited and permitted the growth of, ways of life in the United States that would be wholly uprooted by a change in judicial approach. For Jackson, a determination that *Plessy* had grossly misconstrued the original purpose and meaning of the Fourteenth Amendment would probably have provided the necessary warrant. But as Jackson acknowledged a few paragraphs hence, the Amendment's history was not "inconclusive," as Bickel and Frankfurter alleged; it simply did not support the outcome the Court sought. Without history at its back, all that seemed to be left to justify overturning segregation were the evolving moral standards of society or of the judges tasked with expounding the Constitution. Jackson concluded section 1 of his memos by implying that an evolution in moral opinion, no matter how profound or broad-based, was not, in 1954, an adequate reason to undo what the Court announced in 1896 and had sanctioned ever since.

Section 2 of the Jackson *Brown* memos is entitled "Basis in Existing Law for Decision" in the first two drafts, and (rather ominously) "Existing Law does Not Condemn Segregation" in the third. Draft 3 relocates and lightly modifies the lines quoted above from the end of Draft 2 to the

first paragraph of section 2. Draft 3 then proceeds by asking whether the "States which have maintained segregated schools have not, until today, been justified in regarding their practice as constitutional?" Jackson's reply:

> Of course it is true that all the time there has been visible the warning sign of the due process and particularly the equal protection clause of the Fourteenth Amendment. These majestic and sweeping generalities standing alone can be read to require a full and equal racial partnership in all matters within the reach of the law. They can be read to virtually replace our federation with a unitary form of government. But neither of these clauses specifically mentions education or segregation. Any authority that they give to the judiciary to outlaw segregation has existed as to the State cases since 1868 and in the case of the District of Columbia since 1791. Yet, if these texts had such meaning to the age that wrote them, how could it be that the Fifth Amendment for half a century tolerated slavery in the District of Columbia. And how can it be that when those words were copied into the Fourteenth Amendment and an equal protection clause added, that was not deemed to assure the Negro the right to vote for the Amendment goes on to provide a reduction of Congressional representation for states which do not allow him to exercise the franchise. Nearly two years later (1870) it was found necessary to add the Fifteenth Amendment to assure him the vote, but even then, with the shortcomings of the Fourteenth Amendment obvious, nothing was provided either as to segregation or as to education.

Jackson dismantled the proposition that the original purpose or understanding of the Fifth or Fourteenth Amendments was to outlaw segregation. But that question is not alone dispositive of the Amendments' meaning. In Draft 3, Jackson next remarked: "I suppose that the original will and purpose expressed in a constitutional document is at least relevant to its subsequent interpretation.

So much is implied by the [reargument] questions that we have asked of counsel." But the versions that appeared in the earlier drafts are more revealing. In Draft 1, for example, in addition to the sentiments expressed in Draft 3 quoted above, Jackson proclaimed: "[t]oday it is well agreed, as Judge Cardozo reminded us, that these Constitutional generalities 'have a content and a significance that vary from age to age'. This brings us, however, squarely to the question whether we shall interpret these generalities as they were understood by the age that framed and adopted them or by the age that now reads them." The rest of Jackson's memo studiously avoids answering that question explicitly. But Jackson nonetheless sallied on to survey the Amendment's history, going through the motions of what would be his usual judicial approach:

> In searching for the original will and purpose expressed in the Fourteenth Amendment, all that I can fairly get from the legislative debates is that it was a passionate, confused and deplorable era. Like most legislative history it has the misleading characteristic that its sponsors played down the consequence of their proposal in order to ease opposition to its passage, while its opponents exaggerated the consequences to frighten away support. Among the sponsors of the movement were a few who doubtless hoped that it would bring about complete social equality and early assimilation of the liberated Negro to an amalgamated race. But on every test of strength those of more moderate views prevailed. For example, no support for the abolition of segregation can be cited from the great Emancipator himself. The majority stopped with conferring upon the freed man certain very limited civil rights. Most of the leaders and spokesmen for the movement that carried the Civil War Amendments appear never to have reached a point in their thinking where they considered either the segregation or the education of the Negro to present pressing problems, let alone reaching any conclusion as to their solution.

Although Jackson's dictum about Lincoln's views is inapposite to the legislative debates over the Fourteenth Amendment and the Civil Rights Act of 1866, Bickel's memorandum[381] and subsequent research[382] support the justice's assertions that the Fourteenth Amendment was the handiwork of the moderates of the 39th Congress, that "the majority" of that body "stopped with conferring upon the freed man certain very limited civil rights," and that "the segregation or the education of the Negro" were not understood to be objects of the Amendment or the Civil Rights Act. But, Jackson concluded, these considerations do not exhaust an inquiry into the legislative history of the Amendment. Turning to the practices of the 39th Congress and the ratifying states, Jackson wrote:

> If deeds rather than words evidence purpose, there is little to show that these Amendments were understood or intended in their own time to condemn the practice here in question. The very Congress that proposed the Fourteenth Amendment and all Congresses from that day to this have established or supported and maintained segregated schools in the District of Columbia. This system was notorious and must have been known to every Congressman who voted for District of Columbia appropriations down to this very day…. Turning from Congress to look to the behavior of the States, we find that equally difficult to reconcile with any understanding that the Amendment would prohibit segregation in schools. Nine states did not have segregated schools when the Amendment was submitted to them. Five did, but abandoned at about that time. Four, which had segregated schools, did not ratify the Amendment. Nine Northern States and two border States either established or continued segregated schools after ratifying the Amendment. The eight reconstructed states all

[381] See fn 158, *supra* / Bickel (1955) at 58-59.
[382] See, e.g., Berger ([1976] 1997).

established segregated schools. Down to the present day, seventeen states of the Union are maintaining legal separation of the races in the public schools.

The latter evidence was evidently acquired from the extensive South Carolina and Virginia briefs in *Briggs* and *Davis*, but it is also probable that the Texas brief from *Sweatt v. Painter*, of which Jackson had written Fairman four years earlier, had left a lasting mark on Jackson. As he had remarked in his April 5, 1950 letter, the Texas brief "makes the most complete review of historical materials" and "seem[s] to have established" that the "proponents of the Fourteenth Amendment" had not intended "to interfere with the state school systems on the question of segregation," and "that even those who wanted to see that accomplished acknowledged that it was not accomplished by the Amendment or the civil rights legislation." It is unlikely that this "impression" had faded from Jackson's mind, only to be re-activated or -instilled by the briefs in the *Brown* litigation a few years later. In any case, by this point in the memo, it seems that Jackson has decisively rebutted the proposition that the *historical* purpose of the Civil War Amendments was to forge "a single American society," as Frankfurter argued, and five of the 1953 term justices believed, if that single American society was to require the elimination of racial discrimination in state legislation. But Jackson has not yet exhausted his attack on the soothing myths being bandied about the Court chambers. He next observed that the case for invalidating segregation under a historical reinterpretation of the Amendment was made weaker by the fact that segregation in the decades after the Civil War was a national, not merely a Southern phenomenon.

> It is easy as to the Southern States to smugly assume that segregation has been a projection of pro-slavery and secession sentiment, but that does not account for it in the larger number of Northern States where the same political party that sponsored the Amendments has a large part of the time in most of them also been predominant in the state administrations.

> Plainly, there was no consensus among legislators or educators of the several states ratifying the Amendments that it was to forbid segregation.

The way Jackson phrased this thought in Draft 1 is as follows.

> At this time seventeen states of the Union are maintaining separation of the races in the public schools. Many of these were Northern states governed by the same currents of political opinion and by the same political party that had fought the war, freed the slaves and put through the Amendments. It is hard to charge their continuance of the practice of segregation to mere perversity, prejudice or disregard for law.

In other words, the fact that Northern states practiced segregation at the same time, and well after, they succeeded in foisting the Fourteenth Amendment on the vanquished rebel states, tends to refute the dual propositions that the South had somehow distorted the Amendment's history and interpretation to spuriously legitimate segregation and that the Northern proponents of the Amendment understood segregation to contravene its spirit or letter.

The final nail in the coffin of the historical argument against segregation, Jackson believed, was the role of Northern judges, many of whom fought in the Civil War, were presumably abreast of political developments in their day, and shared in the public understanding of the Amendment in sustaining segregation practices. Draft 1 reads:

> A long line of judicial precedents not only constitutes a usually respected source of law, but judicial decision made close to the time of the Amendment by judges who participated in the movement to enact it are not only entitled to respect as to opinions but as reflection of first hand knowledge of history. But neither in the state courts of the Northern States nor in this Court where Northern men predominated has there been any clear pronouncement

> or line of decision that these clauses admittedly requiring equal opportunity for education prohibit a policy that each race should enjoy its rights apart rather than in co-partnership. The layman must wonder how it comes that the best informed judges who had risked their lives for these Amendments did not understand their meaning, while we at this remote time do understand them.

Perhaps sensing this formulation was unhelpful to his purpose in composing the memo of seeing if a judicial opinion invalidating segregation "would write," Jackson by Draft 3 revised the text to read:

> In the state courts of the North and in this Court where Northern men have predominated no understanding has prevailed that these clauses of their own force prohibit the States from deciding that each race must obtain its education apart rather than in co-partnership. Almost a century of decisional law rendered by judges, many of whom risked their lives for the cause that produced these Amendments, is almost unanimous in the view that the Amendment tolerated segregation by State action – at least in the absence of Congressional action to the contrary.

At this point in the discussion, Draft 3 diverges sharply from Drafts 1 and 2. The latter round out section 2 with a meditation on the role of custom in lawmaking; the former presents the outline of a rational basis scrutiny argument that will comprise the foundation for the rest of the third draft, followed by an abridged soliloquy on the role of custom. Section 2 of Draft 1 concludes:

> Custom too, is a powerful lawmaker. Indeed not long ago we decided that custom has nullified the Constitutional plan for independent Presidential electors. I doubt, as I then indicated, that any custom could be allowed to override express provisions of the Constitution. But here we have the custom of segregation, which is not expressly forbidden and which

has prevailed in both Southern and many Northern states. It must be recognized that in the many judicial decisions which have sanctioned the custom of segregation the judges were following the ancient and well established process of regarding the long established usage of a people as the strongest kind of evidence of its law. But what we decide today is that a custom deeply anchored in our social system is contrary to law.

Draft 2, in lieu of the last two sentences quoted above, concludes by incorporating the following revision:

> This Court, in common with courts everywhere, has recognized the force of long custom and has been reluctant to use judicial power to try to recast social usages. But we decide today that the unwritten law has long been contrary to a custom deeply anchored in our social system. Thus despite my personal satisfaction with the Court's judgment, I simply can not find, in surveying all of the usual sources of law, anything which warrants me in saying that it is required by the original purpose and intent of the Fourteenth or Fifth Amendment.

To summarize, in Section 2 of his drafts, Jackson concluded that:

- the historical understanding of the Due Process Clause of the Fifth Amendment as fully compatible with slavery;
- the unequivocal refusal of the authors of the Fourteenth Amendment to provide blacks with political rights;
- that Amendment's apparent embodiment of the aims of the Moderates of the 39th Congress;
- the evident minoritarian character and general unrepresentativeness, among sponsors of the Amendment, of the views of those who "hoped to bring about complete social equality and consequent early assimilation of the liberated Negro into an amalgamated race";

- the rare or non-existent consideration of segregation in education as a factor in Congressional and state ratification debates over the Fourteenth Amendment;
- the acts of the 39th Congress to establish and perpetuate segregation in the District of Columbia;
- the continuation of Congressional appropriations and support for that segregated system of education through 1954;
- the refusal of the Reconstruction Congresses to require, as a condition of readmission to the Union, Southern states to make any changes with regard to local policies requiring segregation;
- the "establish[ment] or continu[ance]" by nine Northern, two Border, and eight reconstructed Southern states of segregated schools while or shortly after adopting the Amendment;
- the line of Northern state judicial cases following the Amendment's adoption sustaining segregation in education;
- the Supreme Court's own precedents going back to *Plessy*; and finally
- custom, "the strongest kind of evidence of [a people's] law," and which is "deeply anchored in our social system";

all point to the determination that segregation is constitutional. Section 3 of Jackson's drafts, which contains the justice's case for finding segregation unconstitutional, compares unfavorably to Section 2——an impression so obvious that even the March 15 final draft, whose case for overturning segregation is three times as long as the third section in Drafts 1 and 2, and is stated with far more conviction and persuasiveness than its predecessor versions, left E. Barrett Prettyman, Jackson's 1953 term clerk (and who had not seen the previous three drafts prior to reading the last) with the

impression that Jackson was "embarrassed" to reach the conclusion he evidently sought in writing the memo. However, because Draft 3 diverges so radically from Drafts 1 and 2 at this point, I will survey Section 3 of drafts 1 and 2 in tandem before examining Section 3 of Draft 3 separately.

Section 3 of Draft 1 is entitled "III. Sociological and Political Considerations" and features Jackson struggling for five pages to develop a dispositive rationale for overturning segregation. That subheading is deleted in Section 3 of Draft 2, which begins with only the number denoting the section. Drafts 1 and 2 are equal in length through the end of Section 2, but Section 3 of Draft 2 is one page longer than that of Draft 1, mostly owing to the addition of a long paragraph enumerating possible precedents that might provide a precedential basis for Jackson's claim, which appears solely in Draft 2, that "[i]t is neither novel nor radical doctrine that statutes once constitutional may become invalid by changing conditions and those good in one state of facts may be bad in another." This lengthy paragraph of precedents is, in turn, omitted entirely from Draft 3.

Section 3 of Draft 1 begins by acknowledging the enormous pressure the Court, and apparently Jackson himself, felt to reach the moral or just conclusion in *Brown*.

> Various intangible and extra-legal criteria and sociological, psychological and even political considerations are urged to persuade us that whatever was meant or purposed originally we should now decree segregation to end as an obsolete, unjust, and impolitic practice. It is said to be offensive to the best contemporary opinion here and damaging to our prestige abroad. It is said that segregation is based on a philosophy of inherent inequality of races and that it creates in the young negro children an inferiority complex which has a retarding effect on their education progress.

But, Jackson asserted, these arguments are all political considerations, which is to say, properly the objects of legislative, not judicial contemplation. The adjudication of the only properly judicial

claim threaded among these questions of policy, in any case, rendered moot any judicial consideration of the essentially legislative concerns urged upon the Court.

> All of these are arguments of policy with which, in the main as policy, I do not disagree. But if the Constitution forbids any classification for any purpose on the basis of color or race, these arguments are unnecessary and if it permits any classification on such a basis, then the occasion and justification for the classification would seem to present legislative problems for the States, not judicial questions.

Jackson's reference to the deontological anti-classification contention espoused at conference by Black, Douglas, Burton, and Minton, suggests that the argument had earlier caught his eye as presenting the soundest prospective judicial grounds for invalidating segregation. The only problem for Jackson was, of course, that this command would have had to emanate from the Due Process or Equal Protection clauses, and he had found no evidence that those clauses had ever been intended to constitutionalize the categorical imperative, and, what is much worse, a mountain of evidence to the contrary. However, the fastidious judicial approach adopted in the opening paragraphs of Section 3 of his first draft was evidently too inflexible, for in the analogous section of his second draft, Jackson launched a slightly different line of attack.

> Today's decision can not, with intellectual honesty, be grounded in anything other than the doctrine, of which Judge Cardozo reminded us, that these Constitutional generalities "have a content and a significance that vary from age to age." Certainly no one familiar with his teachings would think this meant, what some people advocate, that we declare new constitutional law with the freedom of a constitutional convention sitting continuously and with no necessity for submitting its innovations for approval of Congress, ratification by the states or approval of the people.

In other words, so long as the Court's discretion was bounded, the Court could not be said to be a "constitutional convention sitting continuously." Jackson appeared to have called forth this weak justification to assuage his worry, expressed at the *Sweatt* and *McLaurin* conference four years prior, and strongly evident at the beginning of Section 3 of Draft 1, that transforming the Court from constitutional arbiter to constitutional convention is precisely what would be required to reach the salutary or just outcome in *Brown*. The rationale according to which the Court in *Brown* would not be "amending the Constitution," as Jackson said the Court was doing in *Sweatt* and *McLaurin*, is that "the Constitution must be a living instrument and can not be read as if written in a dead language. It is neither novel nor radical doctrine that statutes once constitutional may become invalid by changing conditions and those good in one state of facts may be bad under another."

In support of this claim, Jackson adduces thirteen Court precedents. The first of these cases, *Nashville C. & St. Louis Railway v. Walters*,[383] held that a federal statue requiring railway operators to pay for one half of the cost of grade separations related to transportation infrastructure development, when applied to a situation in which the improvements concerned the construction of highways for the passage of motor vehicles, amounted to an unconstitutional violation of the railway operator's due process rights, since the improvements in no way related to the operations of the railways and in fact acted as a subsidy for the railway operators' primary competitors: motor vehicle owners and operators. So far so good. Jackson was obviously trying to find precedents for the contention that findings of constitutionality can change with altered social and economic conditions, but the analog to *Brown* is feeble. After all, the statute in question in the railroad case was written for a certain set of economic conditions that no longer obtained, by a Congress that had

[383] 294 U.S. 405 (1935).

failed to foresee the technological changes that would obviate the circumstances for which the law was written, and under a set of new economic conditions the statute operated in a manner that its authors probably would not have intended. In contrast, it is hard to see how the guarantees of the Fourteenth Amendment would turn on the social conditions of the country, especially given the clear record of the proactive efforts of members of the 39th Congress to avoid language vulnerable to future "latitudinarian" abuses and of the widely shared understanding that those guarantees simply constitutionalized the Civil Rights Act of 1866. It is conceivable that the authors of the statute in the railway case would have regretted its unintended perverse effect in altered economic and technological circumstances, and agreed with the Court's decision to alter their handiwork; it is inconceivable, however, that anything other than a tiny minority of the 39th Congress would have agreed that it was appropriate to use the language of Section 1 to overturn segregation and anti-miscegenation laws, both of which were equally pervasive and *de rigueur* in 1866. Perhaps in part due to the flimsy parallel between the cited cases and the course he sought to justify in *Brown*, Jackson ended up deleting this catalog of precedents from his third draft, while retaining the prefatory language that introduced the list in the second draft. He replaced the enumeration of cases itself with the sentence, "A multitude of cases, going back far into judicial history, attest to this doctrine."

In Draft 2, Jackson affixed an addendum to his ruminations in Draft 1 on the imperative of avoiding incorporating into law "psychological and subjective factors." First, Jackson followed Draft 2's list of supporting precedents with a disclaimer stating the NAACP's sociological arguments were inadmissible to the judicial process: "But a good many considerations are urged upon us to decree an end to segregation regardless of what the Amendment originally meant or purposed

which I do not think appropriate for judicial appraisal or acceptance." He then proceeded to survey the various arguments against segregation with which he commenced Section 3 of Draft 1.

> Extra-legal criteria from sociological, psychological and political sciences are proposed. Segregation is said to be offensive to the best contemporary opinion here and damaging to our prestige abroad. It is said to be based on a philosophy of inherent inequality of races, and that it creates in young Negro children an inferiority complex which retards their education and embitters their attitudes to life.

The most significant revision in these lines of the corresponding text in Draft 1 is the addition of "and embitters their attitudes to life," to the contention that segregation depresses black educational achievement. This was probably done, as we will see, to extricate and highlight the emotional valence of the sociological claims Jackson would proceed to critique at greater length as inappropriate inputs to the judicial process.

Jackson next remarked, "[t]hese are disputed contentions which I have little competence to judge as scientific matters but with which, for purposes of the case, I shall not disagree. I have no doubt that segregation has psychological consequences, and social consequences, but as I recall school life without segregation, the Negro still was greatly disadvantaged and must have felt its sting." Interestingly, Jackson's own school experiences with blacks who, though they may "have felt [the] sting" of segregation, were nonetheless not subject to it, did not appear to afford the justice any pause or grounds for skepticism of the sociological claims. Moreover, in the same breath that he admitted that he was not qualified to judge those assertions, he readily accepted them. The considerations Jackson presented in connection with the NAACP's sociological contentions do not point to their unqualified adoption. One would expect greater skepticism on Jackson's part, both because his personal experience in non-segregated educational settings appeared

to contradict the NAACP's central claim that segregation itself retarded blacks' educational advancement, and since the expected consequence of a concession that one is not qualified to judge the veracity of sociological research would be agnosticism toward it, rather than uncritical acceptance.

Jackson's paradoxical acceptance of (or more precisely, decision not to "disagree" with) the NAACP's sociological arguments would cohere with my thesis that he was motivated to compose a defensible judicial case for overturning segregation and the possibility that the motivated nature of the enterprise mediated his interpretation of the sociological evidence. If true, such would, of course, contradict Jackson's explicit disclaimers that the judicial and legislative (or political / moral) questions posed by *Brown* were unconnected. Evidence for the claim that Jackson was motivated is his remark that the unsegregated blacks with whom he went to school nonetheless "must have felt [segregation's] sting." The statement implies that though those particular blacks were not segregated, the deleterious psychological effects that the NAACP sociology imputed to segregation per se must have somehow accounted for those students' "greatly disadvantaged" educational performance. In the absence of supporting anecdotal or other evidence (which Jackson surely believed inappropriate for use in a judicial opinion) this dictum smacks of motivated reasoning, for the justice seemed to afford the NAACP's sociological claims maximum deference and sympathy by connecting those claims to a childhood experience that would appear to disconfirm them, since the students in question were integrated with whites.

Jackson, true to form, then returned to the purely judicial question before him. "I do not think we can import into the concept of equal protection of the law psychological and subjective factors," he said in Draft 1. "I have no doubt that segregation has psychological consequences, but I know too that the woes of the colored child are by no means solved by forcing him into white

company." Although this statement is omitted in this form from Draft 2, it is perhaps the predecessor of the remark, just discussed, that in Jackson's recollection the integrated "Negro was still greatly disadvantaged and must have felt [segregation's] sting." Returning to Draft 1, Jackson continued:

> And if we should regard the feelings and reactions of those who are coerced into segregation I suppose we should also weigh the effect of those who are coerced out of it. While the prosegregation emotion may seem to us less rational than antisegregation emotion, we can hardly deny the existence of sincerity and passion of those who think that their blood, birth and lineage are something worthy of protection by separatism. Such factors are not mensurable by the judicial process. Many classifications that are useful in governing may be disliked and have adverse effects on those classified – minority – are denied privileges that come with the mystic age of twenty-one, married persons are classified differently than single ones, sometimes to their advantage, sometimes not, veterans, even by compulsion, have a separate category in civil service.

Here again, Jackson treated the "prosegregation emotion" with dispassion, and suggested that while it may not be as "rational" as the "antisegregation emotion," it was at least worthy of judicial respect if its opposite was to be afforded the same. Jackson's choice of the word "emotion" to describe the opposed sides in *Brown* is also telling. It calls to mind the remarks of his March 13, 1950, letter to Fairman that the battle over segregation was fueled by passion, not reason; that the justices were susceptible to "unconscious emotional commitments of one sort or another"; and that reason or wisdom appeared to have little to do with the contentions of either side.[384] The inextricably emotive character of the moral and sociological arguments surrounding segregation, Jackson

[384] See discussion at 351, *supra*.

concluded, should render those claims judicially non-cognizable. As he went on to elaborate in Draft 2: "elusive psychological and subjective factors" that are urged upon the Court as grounds for "forcing [colored children] into white company … are not determinable with satisfactory objectivity or mensurable with reasonable certainty. If we adhere to objective criteria the judicial process will still be capricious enough."

Finally, in both drafts Jackson identifies *Korematsu* as a basis for not factoring psychological harm into calculations of the constitutionality of government action. In Draft 2, Jackson declared:

> Such criteria as hardship on those classified have been heretofore rejected by this Court. Not long ago it held that the Constitution does not prevent a classification of citizens by racial descent for seizure and transportation of the Nisi away from their West Coast homes during the war. Korematsu v. United States. U.S. . . Of course if the Court had taken counsel of the feelings or interests of the victims, or simple justice to them it could not have decided as it did.

With these lines, Jackson seemed to emphasize the hypocrisy of those justices——Black, Douglas, and Frankfurter——who a decade before were happy "to rationalize[]" a military order that disregarded not only any psychological effects it would work on American citizens of Japanese descent, but those citizens' Fifth Amendment rights to due process of law, in order "to show that [the order] conforms to the Constitution, or rather rationalize[] the Constitution to show that the Constitution sanctions such an order."[385] Jackson thereby implied that any reliance by those justices, as a basis for disposing of *Brown*, upon quibbles concerning the psychological harms of state laws of a much older and more democratic provenance than the executive and military orders at question in 1944

[385] 323 U.S. 214, at 246.

would indeed be hard to square with their votes in *Korematsu*. As to all the other justices on the Court except Reed (whose vote to sustain the West Coast military exclusion order in 1944 was, at least in this respect, consistent with his rejection of the NAACP's sociological arguments as a basis for a decision in *Brown* a decade hence), including himself, Jackson insinuated that there was the constraint of *stare decisis*. "While I did not agree with th[e] basis of classification [approved in *Korematsu*] as compatible with the concept of Due Process," Jackson wrote in Draft 1, "I do not think we should read into the concept of equal protection the shadowy and changing doctrines relating to mental and emotional reactions." Consequently, the Court in *Korematsu* was wrong about due process, but correct to disregard the supposition of deleterious psychological effects as a basis for invalidating the government's actions on constitutional grounds. And, presumably, its benign neglect of such allegations establishes a precedent the Court would do well to follow a mere decade later in *Brown*.

The thrust of Jackson's comments on the question of whether the judicial process should countenance "feelings and reactions" (Draft 1) and "psychological and subjective factors" (Draft 2) is not just that such factors are not susceptible of precise measurement, but that much, if not all, legislation induces such effects in those persons it touches. Persons younger than 21 might dislike their minority status, married or single persons might resent the set of rights afforded exclusively to the other class, and so on. But if repealing laws to remedy feelings of resentment was to become a basis for judicial action, then the judiciary would come to find itself very busy indeed. Moreover, if the desires of blacks were to be an appropriate input to the judicial process, so too then must be the feelings of whites whose legislative majorities had excluded blacks from comingling with the white populations those legislators represented. Jackson seemed to conclude, in sum, that there were no *a priori* judicial criteria for assigning weights to the preferences of distinct classes of

citizens and then balancing those weighted preferences against each other. That, he implied, is what the representative process, and not the judicial one, was for. Finally, Jackson's remarks pointed to the conclusion that urging "mental and emotional reactions" as a constitutional basis for invalidating legislation was a thinly veiled pretext for advancing naked policy goals, since that same rationale was never leveraged against other legislative classifications to which it was just as, if not more, applicable.

Jackson next examined whether the Court should consider public opinion when interpreting the Constitution, and concluded that "responsible and rational"——i.e., elite——"public opinion" was not an appropriate input to the judicial process. Here, Drafts 1 and 2 are substantially synonymous, but I will quote from Draft 2 exclusively since the language is slightly more polished. First, Jackson acknowledged the influence that the defeat of Nazi Germany and the postwar discovery of its crimes had wrought upon American elite consciousness.

> No informed person can be insensitive to the fact that the past few years have witnessed a profound change in the responsible and rational public opinion toward segregation and all related problems. The awful consequences of racial prejudice revealed by the post mortem upon the Nazi Regime in Europe have caused a revulsion against the kind of racial feeling that was manifest in the Korematsu case.

This observed change in "responsible and rational public opinion" and the "revulsion against the kind of racial feeling that was manifest in the Korematsu case" are allusions to the "liberalization of American attitudes toward race" of which Hockett[386] so often speaks, and comprise the clearest direct evidence for it in any of the *Brown* primary source material. Indeed, it was precisely this shift in elite opinion that accounted for Jackson writing these memoranda in the first place, for

[386] Hockett (2013).

without that powerful and pervasive shift in attitudes, there likely would not have been five votes to invalidate segregation, and consequently no pressure on Jackson to rationalize a "congenial political" outcome for which, he was still struggling to develop a judicial basis. Furthermore, though Jackson abhorred the "racial conceits" that undergirded the Nazi regime, neither his role in Nuremburg nor his experience with "real racial antagonism" in Washington, D.C. had appeared drastically to impact his sentiments regarding the justice of segregation. He himself had not, in other words, undergone the "profound change" that he had observed in elite opinion, and which was now exerting itself upon him by way of the other justices' confident proclamations in conference that segregation was immoral and unconstitutional.

However, Jackson reluctantly conceded, the will of elites was not enough to change the Constitution.

> But what part public opinion should consciously play in judicial decisions is another matter. If the matter be one of policy then, of course, the will of constituents should govern. But judges have no constituents and the representative branch of our government is the Congress. We have pondered this problem, as we have pondered no other in my experience on the Court, and have read the briefs of learned counsel for all parties and the lengthy research which rescues much obscure history from oblivion and have heard the arguments of the parties. If we consciously defer in our deliberation to those who have done none of these things, it means that the judicial process has counted for naught, and the judgment is made by those who have not heard the arguments instead of by those who have. The real question as I see it is whether the Constitution permits any classification or separation of Negro and White merely on the basis of color or racial ascent. If not these policy arguments are superfluous and, if so, they are for consideration of the legislatures not the courts.

Jackson's use of "conscious" in the very first sentence of the above excerpt suggests that he entertained the possibility that public opinion or the general moral atmosphere of a time and place might inexorably operate upon the decisions and reasoning of judges, no matter how strenuous their efforts to insulate their decision-making process from the opinions of their fellows. Such a phenomenon was precisely what Jackson appeared to allude to when he remarked in his March 13, 1950 letter to Fairman that the other justices all appeared to be under "conscious or unconscious emotional commitments of one sort or another" regarding the questions posed in *Sweatt* and *McLaurin*. Moreover, we can safely assume that those questions were *moral*, not constitutional ones, for the public lacks the judicial training to make the latter judgments, but excels in making the former. Accordingly, we can conclude that Jackson was aware of and therefore on guard against the subtle ways in which public opinion on moral questions——which, in the context he used it, really means elite opinion, i.e., the opinion of the D.C. social milieu in which he and the other justices were immersed——may influence the judicial process without any judge ever intending it to do so, and indeed despite a judge's fastidious precautions against the same. Jackson, finally, was certainly aware that *Brown* was a case in which that danger was more acute than ever: "[w]e have pondered this problem, as we have pondered no other in my experience on the Court."

In his remark contrasting public opinion to the Court's counsel-mediated study of the problems posed in *Brown*, Jackson implied that the judicial process is a technical one not properly susceptible of moral inputs cribbed from the opinions of persons unfamiliar with the judicial history, no matter how authoritative or compelling their views. This position is notably at odds with Frankfurter's, who, as we have seen, managed to convince himself that "[t]he effect of changes in men's feelings for what is right and just is equally relevant in determining whether a discrimination

denies the equal protection of the laws." That, however, is a bridge Jackson never persuaded himself to cross——at least not consciously.

At this point, Drafts 1 and 2 diverge sharply. I will examine the remaining two pages of Draft 1, and then the last three of Draft 2 that supplant those final pages of Draft 1. The most important difference between the two drafts, however, I will state upfront. Without ever firmly developing a constitutional case for overturning segregation, Jackson argued in the remainder of Draft 1 that Congress alone had the constitutional power, and should adopt legislation, to end segregation; the last pages of Draft 2, finalized some five weeks after Draft 1, contained the first version of an actual constitutional argument to overturn segregation. Thus, Jackson did not or could not conceive the judicial case against segregation until some time after he first tried his hand at an opinion whose apparent purpose was to see if such a rationale could be developed: Jackson conspicuously failed in his first attempt. But that all three drafts were obviously geared toward reaching a conclusion that was noticeably absent from the first attempt, and for which Jackson lacked a plausible rationale until the second draft of February 15, 1954, indicates that Jackson composed the memos in order to rationalize a conclusion for which he did not yet have firm judicial reasoning. There is proof more direct than this that Jackson's constitutional case to overturn segregation was motivated by a desire to reach that particular conclusion, not by constitutional reasoning that inexorably pointed to it: the conclusion that segregation was invalid preceded the constitutional rationale he finally articulated in Draft 2 and further refined in Draft 3.

These facts fit squarely with the prediction of the social intuitionist model that judgment is incident to emotion or intuition, and reasoning to judgment. In Jackson's case, the intuition as such was not the nakedly *moral* one many of the other justices——notably Warren, Black, and Frankfurter——experienced, but most likely a perhaps equal or greater desire not to be on the wrong side

of history. First, Jackson desired not to be left out of the majority on such a seminal decision, whose outcome, he no doubt expected, would be ecstatically welcomed by all corners of "responsible and rational" society. As a result of the second *Brown* conference, he almost certainly knew that the Court would reverse the lower courts that had applied *Plessy*, with or without his assent. Warren's replacement of Vinson made five votes to reverse, and, given Frankfurter's palpable moral energy regarding the matter and despite his overly effusive protests to the contrary, there was almost certainly a sixth in Frankfurter, who no doubt discussed the case at length with Jackson, his closest colleague on the Court. Furthermore, Clark's comments at the second *Brown* as to the way in which a majority opinion should be written telegraphed that probably he too would eventually go along with the others. With Reed the only certain holdout, the best for which Jackson could reasonably hope was that Clark would join him and Reed in dissent; more likely, Jackson could count only on Reed remaining steadfast in dissent. That made a vote of 7 to 2 if Jackson demurred or 8 to 1 if he found a way to surmount his judicial qualms. Jackson probably did not relish the prospect of being a minority vote to sustain a practice that, whether or not he was emotionally invested in it, was viewed with increasing opprobrium by judicial colleague and rational enlightened layman alike.

Second, there was the matter of inevitability. Recall that Fairman had told Jackson in reply to the latter's interrogatories over what the Court's role should be in ending segregation that

> The Negro hopes to establish the proposition that no segregated treatment can be fully "equal". In thinking about these current cases I have come to believe that this proposition will sooner or later become the law of the Constitution, because I believe it is true and will become recognized as true. I am a good deal impressed by what I read on this point in the

> briefs … not for any "authority" there found but because as I read it, I think, This must be true.

Jackson himself appeared to share Fairman's view that a Supreme Court decision abolishing segregation was inevitable; as the justice acknowledged in Draft 2, "[w]hatever we may say the law is today, I have no doubt that within a generation segregation will be outlawed. As the twin forces of mortality and replacement operate on this bench that seems inevitable unless some dramatic and unforeseeable excess by the Negro and his friends shall cause reversal of present trends." This revealing aside was omitted from Draft 3, probably because Jackson in Drafts 1 and 2 was still primarily thinking through the material as he wrote, but by Draft 3 he had begun editing out evidence of the memo's origins as essentially long form brainstorms, and refining the text to make the constitutional argument he brought into high relief in the third draft appear as inexorable as it was in fact rationalized. In any case, Jackson must have concluded that it made little sense to dissent when doing so would exert no practical influence on the outcome of the decision, and would relegate him to the ignominious position of defending a practice that others, like Fairman, whom he admired and respected were apparently hoping he would help dismantle.

Such must have been the considerations weighing on Jackson as he composed the last pages of Draft 1, which, after concluding that "construe[ing]" the Amendment "in the light of [contemporary] public opinion" would be inappropriate, presented a solution to the problem of segregation that the Constitution explicitly countenanced.

> The Fourteenth Amendment does not contemplate a static and perpetual condition, but makes provision for recognizing and giving effect to changing conditions and currents of opinion in application of its principles to an expanding and developing society. Whatever

> doubt and confusion may exist as to the meaning of other phrases of the Fourteenth Amendment, one thing is perfectly clear. It provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." Thus, the Amendment does not attempt to speak the last word on the subjects with which it deals in such generalities, but anticipates that from time to time there will be necessity for supplemental and interpretative action. If Congress were to find segregation an obstacle to achieving the purposes of the Amendment and that legislation to abolish it was therefore necessary and proper, I do not suppose any Justice would doubt the Constitutionality of such an act. Certainly if the Amendment condemns segregation without any implementation, it could not be less effective if it were implemented by a statute. So we have to assume that a complete and undoubted power to deal with this subject exists in a branch of the government co-ordinate with our own and one which is chosen by political methods and responsive to political .

Reflecting the political origins of his appointment to the Court in the war between the representative branches of government and the Court over the constitutional deference the latter should afford federal legislation, Jackson demonstrated his distinctive interpretive disposition, the fullest expression of which manifested itself in his opinion for the Court in *Wickard v. Filburn*.[387] In a word, Jackson evidently believed that Section 5 of the Fourteenth Amendment was a virtual blank check to Congress to legislate on social equality. This would be so, evidently, despite the evidence indicating the Amendment's framers intended the first four sections to act as constraints upon Congress' discretion. Jackson made a prudential allusion to the limits of judicial capacity to implement any decision purporting to do (as Jackson would have it) that which Congress alone possessed the undisputed constitutional license and political means to achieve. It is hard to say which concern,

[387] 317 U.S. 111 (1942).

if only one, is cause, and which, if any, pretext, but here is firm evidence that Jackson, alone among the justices, doubted the judiciary's ability unilaterally and efficaciously to "forbid[] a custom deeply anchored in our social system."

Jackson concluded Draft 1 with ruminations on the claim that Congress was deadlocked with respect to outlawing segregation and on the exhortation to the Court to act in the vacuum that Congress' inaction had created. The Court could not assume, Jackson affirmed, that Congress did not take seriously its responsibility to implement the Fourteenth Amendment. And, if the Court were to conclude the opposite, then it must accept that Congress had determined that segregation was not inconsistent with "equal protection of the laws": though it "has not expressly approved segregation, it has at least repeatedly tacitly supported it in the Nation's Capital and has made no effort to outlaw it either in the federal territory or in the States." Congress' manifest interpretation of the Fourteenth Amendment——through both action and inaction——seemed dispositive to Jackson of the constitutional merits, at least in Draft 1: the ensuing sentences——the last lines of the draft——declared the Court's hands are and must be tied.

> It is said, however, that the South has enough representation to prevent such a step. But that is to say that the Court should intervene to promulgate as a law that which our Constitutional representative system will not enact. It means nothing less than that either Congressional representation does not represent sentiment or public sentiment does not resent segregation. It means nothing less than that we must act because our representative system has failed.

Jackson had not, at this very late hour in his judicial career, come to accept the theories of judicial intervention articulated in *Carolene Products*,[388] or, as would be expressed some years hence,

[388] 304 U.S. 144 (1938), fn 4, at 152-153.

Baker v. Carr[389]: the failure of the nation's representative institutions, and any constitutional design flaws to which that breakdown pointed, were not, in Jackson's view as of January, 1954, adequate reasons for judicial action in excess of judicial capacity.

To reiterate: that Jackson went back to the drawing board in the last three pages of Draft 2 supports the hypothesis that he was motivated by a desire to find a judicial basis for segregation, one whose failure to emerge in Draft 1 is indicative of both the post hoc cast of that case and the struggle Jackson experienced in developing it. Indeed, not only had any kind of judicial case for overturning segregation failed to emerge, but the preponderance of considerations broached in the first Draft pointed decisively to judicial acquiescence in the constitutional status quo if not an outright affirmance of *Plessy*. Even with the novel rationale at the end of Draft 2 and its expansion and refinement in Draft 3, the preponderance of evidence pointing to affirmance rather than reversal is a problem that conspicuously persists through all three drafts.

Draft 2 replaces Draft 1's account of Congress' role in ending segregation with a sketch of an argument that though segregation may not have been in the crosshairs of the Fourteenth Amendment at the time of the latter's adoption, subsequent changes in the black population, not ones in constitutional interpretation, had rendered segregation unconstitutional four score and six years later. "I think the change which warrants our decision," Jackson concluded, "is not a change in the Constitution but in the Negro population."

> Certainly in the 1860's and throughout the nineteenth century the Negro population, as a whole, was a different people than today. Lately freed from bondage, they had no opportunity as yet to show their capacity for education or assimilation, or even a chance to demonstrate that they could be self-supporting or in our public life anything more than a

[389] 369 U.S. 186 (1962).

> pawn for white exploiters. I can not say that it was an unreasonable assumption that negro educational problems were elementary, special and peculiar and their mass teaching an experiment not easily tied in with the education of pupils of more favored background. Nor, when we view the progress that has been made under it, can we honestly say that the practice of each race pursuing its education apart was wholly to the Negro's disadvantage. His progress under these conditions has been spectacular. Whatever may have been true at an earlier period, the mere fact that one is in some degree colored no longer created a presumption that he is inferior, illiterate, retarded or indigent.

In other words, segregation might have had a rational purpose when blacks were only recently freed from slavery and had not yet had an opportunity to demonstrate their equality white whites, but segregation lacked a rational relationship to public education in 1954, when blacks as a group had grown into a parity with whites——a salutary development that the framers of the Fourteenth Amendment had not and perhaps could not have envisioned.

It is clear why this train of reasoning would have been attractive to Jackson. First, it did not require re-interpreting or (to use Jackson's locution from the *Sweatt* and *McLaurin* conference) "amending" the Constitution. The Court could claim fidelity to the understanding and purposes of the Fourteenth Amendment at the same time as it reached an outcome that would almost certainly have offended the text's framers if suggested as an implication of the provision in 1866, and could do so by claiming that the framers would have indeed targeted segregation had the American black population of 1866 reached the level of human attainment and development it would by 1954. If such counterfactuals were unconvincing, the Court could in any case argue that fidelity to (a none-theless finessed version of) the framers' understanding of the principle they espoused——which, in its finessed form might be stated as "equal treatment for like individuals"—required taking notice

of the vastly different social conditions of almost nine decades' remove when applying that principle. It would follow that when so applied, the principle stood at odds with the social facts of 1954, or rather, the social facts with it.

Second, Jackson's rational basis argument might remove the discernible, specific intentions of the Amendment's framers from the judicial ledger, in the same way that Bickel intended his gloss on the Amendment's history to authorize the justices to forget about it as "inconclusive" or count it among their reasons for overturning segregation. Bickel's interpretation of the history, even in the immature form it assumed in the Prefatory Letter that actually reached all the justices, might well have exerted its influence here. Third, the interpretative avenue Jackson adopted at this late stage of Draft 2 would enable the Court to split the baby of precedent: at the same time as it might overrule *Plessy*, the Court could nonetheless hew to its longstanding rational basis test for equal protection, and therefore plausibly contend that what had changed was not the rule of law but the social circumstances to which that same law had always been and was now being faithfully and consistently applied. In sum, the rational basis argument that not the law but the social facts to which it appertained had changed would surmount many of the constraints Jackson evidently felt in developing a judicial basis for overturning segregation.

Of course, the obvious objections to Jackson's putative argument are who gets to decide, under what circumstances, and on the basis of what criteria. As the justice himself stated in Draft 1, the proper constitutional superintendent of social legislation for the nation, in terms of both legitimacy and capacity, is Congress; that the nation's "Constitutional representative system" has failed is not a sufficient pretext for judicial action to address problems only Congress might actually succeed in fixing. Though Jackson omitted that contention in Draft 2, it is unlikely that he did so because he no longer subscribed to it; rather, he probably did so because it was unhelpful to the

judicial case he was developing. But deleting the contention from his memo would not have deleted it from his mind, and the argument evidently continued to weigh on him as he wrestled with developing a rationale for the Court "to promulgate as a law that which our Constitutional legislative system will not[.]" Finally, the criteria according to which the Court could declare that blacks had reached parity with whites probably also bothered Jackson. The selection and application of these criteria would seem to involve precisely the kind of sociological reasoning and evidence he disclaimed in all three drafts of his memos for involving "elusive psychological and subjective factors" that were not "determinable with satisfactory objectivity or mensurable with reasonable certainty." As he concluded his discussion of sociological inputs to judicial decision-making in Draft 2: "[i]f we adhere to objective criteria the judicial process will still be capricious enough." Jackson must have therefore thought, even as he constructed his rational basis case for ending segregation in the second and third drafts, that the central determination on which that case rested was inextricably and perhaps fatally subjective.

There is certainly evidence that Jackson felt uneasy about his rational basis claim in Draft 2: after expounding it, he laid out two arguments that are basically inapposite to the rational basis case but were nonetheless adduced in support of his finding that segregation was or should be held unconstitutional. The first of these supporting contentions was that "mixture of blood" exacerbated the injustice of segregation. "[A]ssimilation is under way to a marked extent," Jackson wrote. "Blush or shudder, as many will, mixture of blood has been making inroads on segregation faster than the courtroom. A line of separation between the races has become unclear and blurred and an increasing part of what is called colored population has as much claim to white as to colored blood. This development baffles any just segregation effort." Jackson's point here is that segregation's rationality and the racial admixture of the segregated populations were inversely proportional: the

more racial boundaries were blurred, the less justifiable social legislation predicated on those boundaries would become. However, at bottom, this claim reflects a value judgment of the kind Jackson usually sought to exclude from the judicial process, an evaluation whose opposite conclusion could just have surely, and perhaps more consistently with Jackson's prior discussion of the respectability of the sentiments undergirding racial segregation, been proffered. Recall that earlier in his memos Jackson remarked, "[w]hile the prosegregation emotion may seem to us less rational than antisegregation emotion, we can hardly deny the existence of sincerity and passion of those who think that their blood, birth and lineage are something worthy of protection by separatism." This view, applied to Jackson's observation of increasingly blurred racial boundaries, could have produced precisely the opposite conclusion Jackson presented above; that is, that increasing racial admixture rendered segregation, from the perspective of those who with "sincerity and passion … think that their blood, birth and lineage are something worthy of protection by separatism," increasingly needful. This realization suggests, once more, that Jackson was struggling with what Tushnet generally described as the justice's "deep[] ambivalen[ce] about the question of race."[390] Another way to put this is that Jackson was motivated in Drafts 2 and 3 by a desire to develop a judicial case against segregation and to overcome his neutral personal sentiments toward segregation. That motivation accounts for the apparent slant evident in the Jackson's analysis at this stage in the memo.

The second of the supporting contentions Jackson adduced to invalidate segregation foreshadows Warren's distinguishing in the final *Brown* opinion of the "status of public education" in the 19th Century and the status of public education in the mid-20th Century.

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[390] Tushnet (1991), 1880.

> Also relevant changes have occurred in the status of the public school. Education, even for the whites, was once regarded as a privilege bestowed on those fortunate enough to be able to take advantage of it and often was not compulsory. The concept today has changed. Education is not a privilege but a right and more than that a duty, to be performed not merely for one's own advantage but for the security and stability of the nation. Access to educational facilities has been gradually transformed from a matter of grace into a right which may not be encumbered with unconstitutionally discriminatory or oppressive conditions. And while education was long regarded as at most a local or state concern, far from the reach of federal authority, the federal judicial power especially, and the appropriative power of Congress has moved in to the local problems and made education a national concern.

Like the conclusion that increasing racial admixture "baffles any just segregation effort," this too was clearly a motivated or instrumental argument. As pointed out in Chapter 2, when this claim was considered in the context of Chief Justice Warren's decision for the Court, this assertion cannot have been a defensible basis for a determination that segregation was constitutional, because at the time of *Brown* the Court had never even heard a case posing the question of whether public education was a constitutional right, and had certainly not found (and would not subsequently find, when it did squarely address the issue)[391] that public education numbered among the constitutional rights of citizens. The declaration, therefore, that the "status" of public education has changed was simply a means of discounting the relevance of the arguments of those who would say that the history of the Fourteenth Amendment limited the scope of Section 1 to the narrow civil rights objectives of the Moderates of the 39th Congress, or, which is to say the same thing, a means of

[391] *San Antonio v. Rodriguez*, 441 U.S. 1 (1973).

neutralizing the specific pronouncements of the framers of the Fourteenth Amendment on that Amendment's scope and purpose. For where there is no support among the framers' dicta for the proposition that the Amendment was intended or understood to ensure equality of social rights, the allegation that those statements do not control anyway because public education, such as it exists today, did not then exist, will suffice to dispense with the need for a historical justification for reinterpreting the Amendment to achieve the result the justices seek.

Jackson betrayed hints that he was aware of the weakness of his argument about the changed status of the role of public education in American society, at least insofar as it was relevant to the judicial process. For example, Jackson's proclamation that "access to educational facilities has been gradually transformed from a matter of grace into a right which may not be encumbered" by discrimination implies that the Court had ruled that access to public educational facilities was a constitutional right when, of course, the Court had not. All it had found, in cases such as *Sweatt* and *McLaurin*, was that when the privilege (because allocated by the state according to legislative discretion) of a post-secondary education is offered to citizens by the state, it must be made available to all citizens on a substantially equal basis. Jackson was on firm footing if his contention that public education had by 1954 become "a right, and more than that, a duty" rather than "a matter of grace" referred to the emergence in the United States in the first half of the Twentieth Century of a general social consensus that primary and secondary education was to be free, public, and compulsory.[392] But that the statement was written to imply more than it could support under scrutiny suggests Jackson may have been cognizant of the weakness of these auxiliary arguments, and given the justice's usual abhorrence for shaky reasoning, he must have felt acutely the pain of employing it himself. The same goes for the last sentence quoted above. Jackson could not argue

[392] With constitutionally-protected exceptions, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

that the Court had declared public education to be a constitutional right, so the most he could say was that the federal judiciary had nonetheless been involved in public education. The intended implication, that the Court was thus empowered to end a "custom deeply embedded in our national life," does not follow from the facts to which the statement empirically refers: that is, the deference the Court had until 1948 unequivocally extended to "deeply imbedded [] social custom[s] in a large part of this country" regarding segregation.

Jackson rounded out Draft 2 with an underdeveloped stab at remedy. "The Negro is not free of local educational control," Jackson said. "He must meet the prescribed standards of learning, discipline and health. He may be treated on his individual merit as a pupil, attend schools set apart for those of his neighborhood. But he may not be included or excluded merely because he has Negro blood wholly or in part." Jackson's prescription was remarkably close to the remedy the Court would eventually promulgate in *Brown II* ("to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed" and to "effectuate [] transition[s] to racially nondiscriminatory school system[s]"[393]), all the more so because Jackson would not participate in *Brown II*, nor would any of his colleagues see the first two versions of Jackson's memoranda on the *Brown* merits. The upshot of Jackson's inchoate treatment, nevertheless, was that the remedy would be deontological, which is to say, colorblind. Though he would change his opinion on this score in Draft 3, that the first thought on remedy that apparently came to Jackson was deontological might be imputed to the conference comments of colleagues who spoke in favor of overturning *Plessy* (in deontological language, even if well-developed deontological arguments were lacking), and the NAACP's 1952 term briefs, which requested a colorblind remedy in the cases.

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[393] *Brown v. Board of Education II*, 349 U.S. 294 (1955), at 294, 296.

Returning to the point in the third draft at which that version diverges markedly from the first two, Section 3 of Draft 3 is entitled, "Limits of Judicial Action." In the first paragraph of Section 3, Jackson presented a strategic case for the judiciary to overturn segregation. "In view of the deference habitually paid by other branches of the government to this Court's interpretation of the Constitution," Jackson observed, "it is not unlikely that a considerable part of the inertia of Congress and of the country has been due to the belief that the existing system is Constitutional." Thus, Jackson recognized that the political position of those in Congress and the executive who favor desegregation would be drastically strengthened by a declaration by the Court that segregation is unconstitutional. At the very least, such a holding would break the "inertia," and perhaps foment remedial action on the part, of a Congress that had not then acted to extend equal guarantees of social rights to blacks.

Much of the remainder of Section 3 of Draft 3 amounts to a refinement of the ideas expressed in the analogous section of Draft 2, so I will proceed focusing only on the major substantive revisions. First, Jackson confirmed his Draft 2 suggestion that rational basis scrutiny is the appropriate analytic framework for deciding *Brown* by articulating the controversy posed in the case as follows: "[t]he real question to me is, assuming the same premises upon which earlier courts have reasoned as to the power of the State to make classifications based on real differences and to make reasonable distinctions in treatment based on those classifications, segregation can today be sustained." Second, he reiterated his contention from Draft 2 that "[i]t is neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions and those held to be good in one state of facts may be held to be bad in another," though Jackson subsequently omitted the enumeration of supporting precedents that had appeared in the preceding memo draft.

However, Jackson then elaborated considerably upon the paragraph that in Draft 2 had declared that "the fact that one is in some degree colored no longer creates a presumption" of inferiority. In Draft 3, Jackson added the following.

> Whatever may have been true at an earlier period, the mere fact that one is colored does not today create a reasonable presumption that he is inferior, retarded, or a special problem in education. Certainly in the 1860's and throughout the nineteenth century the Negro population as a whole was a different people than today. Lately freed from bondage they had no opportunity as yet to show their capacity for education or assimilation or even a chance to demonstrate that they could be self-supporting or anything more in public life than a pawn for white exploiters. There was a strong belief in heredity and the Negro's heritage was close to primitive. Likewise his environment from force of circumstance was not conducive to his mental development. I do not find it necessary to stigmatize as hateful or unintelligent the early assumption that Negro education presented problems that were elementary, special and peculiar and that the mass teaching of Negroes was an experiment not easily tied in with the education of pupils of more favored background. Nor, when I view the progress that was made under it, can I confidently say that the practice of each race pursuing its education apart has been, up to now, wholly to the Negro's disadvantage. From my little experience in a non-segregated school, it is clear to me that to mingle closely with White pupils does not fully solve the Negro's psychological or educational problem. Indeed, Negro progress, even under segregation, has been spectacular and tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man. It has enabled him to outgrow the system and to overcome the presumptions on which it was based.

In this excerpt, Jackson continued to hammer home the salience of changed social circumstances to the outcome of rational basis scrutiny. Prior to the middle of the 20th Century, it was not "hateful or unintelligent" to view segregation as a rational means to a legitimate government purpose of accommodating the special educational needs that blacks presented. The obvious problem with this line of argument, though, is that providing for the special educational needs of black students was a rationalization: states sought to exclude blacks not because they wanted to help blacks, but because they didn't want black pupils to "drag down" white ones, and generally wanted to preserve white "racial integrity."[394] More importantly, though, Jackson implicitly endorsed a theory of sociological causality regarding black disadvantage——that slavery prevented, and Jim Crow laws continue to prevent, blacks from attaining educational parity with whites——perhaps even without recognizing that he had done so. After Jackson's criticism at the *Brown* conference in 1952 that "Marshall's brief starts and ends with sociology," that line of sociological argumentation was vindicated, if only rhetorically, by Jackson's acceptance of its theory of causality.

Despite Jackson's evident acceptance of the NAACP's sociological claims, the justice presented evidence from his own life and observations that indicated that he might still have been of two minds on the question of causality. As in the earlier drafts, in Draft 3 Jackson observed that his personal experience with integrated schooling did not suggest that integration alone would solve blacks' educational problems. This tends to belie the thrust of the NAACP's sociological claims that environment was primarily responsible for educational outcome and that state-sponsored segregation discouraged black educational performance primarily by "psychological" pathways, that is, by symbolizing blacks' inferiority, stigmatizing blacks as unfit to associate with

[394] Justice Reed's conference comments (discussed in Chapter 4) reflect this widely shared if deteriorating early-century consensus.

whites, and thereby conveying a message to blacks that they are unwanted and inferior. Moreover, it is possible to interpret Jackson's own analysis of the recent progress of blacks as contradicting his operating assumption that segregation had subordinated them: "Negro progress, even under segregation, has been spectacular and tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man. It has enabled him to outgrow the system and to overcome the presumptions on which it was based." At a bare minimum, this comment would indicate that Jackson had reason to exercise closer scrutiny of the NAACP's sociological claims, whether or not he indeed did so.

Both Jackson's remark about the inefficacy of integration and his comment about blacks' recent "spectacular" progress point to the deeper problem of identifying the specific constitutional harm or offense that inheres in segregation and a theory of empirical causality to undergird it. Is the constitutional harm of segregation educational disadvantage (consequentialist) or (since state-enforced segregation, as the rest of Jackson's memo would claim, runs afoul of rational basis scrutiny analysis) classification on the basis of race (deontological)? If the former, is the theory of causality that *de jure* racial discrimination retards blacks' educational performance as by, for example, discouraging blacks from learning, or that physical separation from whites does, as by, for instance, ascribing a social stigma to blacks? The choice of theory of causality is inapposite to the deontological discrimination framework, since the anti-classification argument posits that the harm in segregation is primarily moral rather than empirical, although empirical harms might well issue too.

Jackson did not seem to have delved deeply into the social science and developed a well-reasoned position on exactly what species of harms, and which harms specifically, segregation, state-sponsored or otherwise, inflicted on blacks. Yet that he treated the arguments as persuasive

suggests two mutually compatible possibilities: (1) Jackson was engaged in motivated reasoning to declare segregation unconstitutional, and needed every argument he could find in order to do so, including sociological ones of questionable (in Jackson's view, as expressed in other contexts) judicial relevance, and (2) Jackson's reasoning was mediated by ease of retrieval, that is, that "the implications of recalled content may be qualified by the ease or difficulty with which that content can be brought to mind."[395] It is possible that Jackson believed that the arguments advanced by the NAACP were of higher quality or persuasiveness precisely because they had been so frequently repeated, from the 1949 term on, by the NAACP counsel, the other justices, and even Jackson's private acquaintances. Representative of this last category of inputs is, of course, Fairman's March 30, 1950 correspondence with Jackson (quoted above), in which Fairman stated forthrightly that "[i]n thinking about these current cases [*Sweatt* and *McLaurin*] I have come to believe that [] the proposition [that "no segregated treatment can be fully 'equal'"] will sooner or later become the law of the Constitution, because I believe it is true and will become recognized as true." In light of the fact that Jackson gave evidence in all of his draft memoranda of not having processed deeply the sociological arguments about segregation's harms, ease of retrieval is a strong possible contender for a mediating factor on Jackson's reasoning.

Jackson stated the crux of his constitutional case against segregation in the next paragraph, which is unique to the third draft. There, he announced that there was no longer any rational basis for classifying on the basis of race in public education.

> The handicap of inheritance and environment has been too generally overcome today to warrant such a classification based on race alone. I do not say that every Negro everywhere is so advanced nor would I know whether the proportion who have shown educational

[395] Schwarz et al. (1991, 200).

> capacity is or is not everywhere similar. But it is sufficiently general to require us to say that the mere possession of colored blood, in whole or in part, no longer affords a reasonable basis for a classification for educational purposes and that each individual must be rated on his own merit. Retarded or subnormal ones, like the same kind of Whites, may be accorded separate educational treatment. All that is required is that they be classified as individuals and not as a race for their learning, aptitude and discipline.

Without using the words "rational basis," Jackson applied rational basis scrutiny and found that the recent advance of blacks rendered obsolete the assumptions on which *Plessy*, *Gong Lum*, and other cases were based——assessments of blacks and American society that, Jackson implied, were valid, or at least arguably so, at the time they issued. In other words, Jackson's solution to the segregation question mirrors Frankfurter's: social changes can render unconstitutional today government treatment that was constitutional 60 or even 25 years ago. Frankfurter eventually convinced himself that what compelled the judiciary to invalidate segregation were "changes in men's feelings for what is right and just"; Jackson, in turn, concluded that "the change which warrants our decision is not a change in the Constitution but in the Negro population."

Employing changes "in the Negro population" observable in the present day as a basis for overturning 58 years of precedent was a weak reed upon which to rest a judicial case for invalidating segregation, and Jackson almost certainly sensed this. For one, Jackson devoted only a single paragraph to the rationale disposing of segregation's constitutionality. For another, the wording of the paragraph suggests timidity and uncertainty. His acknowledgment that "I do not say that every Negro everywhere is so advanced nor would I know whether the proportion who have shown educational capacity is or is not everywhere similar" is not precisely a ringing, confident declaration that blacks have attained the parity with whites upon which Jackson's constitutional argument

rests. Finally, Jackson made no effort to quantify whether the proportion of blacks "who have shown educational capacity" was similar to that of whites. Jackson's assumptions seemed to be that any nontrivial proportion is sufficient, that it is not necessary to specify quantitatively what threshold divides the two, and that that proportion in any case need not be measured empirically. Accordingly, his ostensible conclusion was more a statement of discretionary, subjective impression than a deduction compelled by ironclad premises: "But it is sufficiently general to require us to say that the mere possession of colored blood, in whole or in part, no longer affords a reasonable basis for a classification for educational purposes and that each individual must be rated on his own merit." Jackson's conclusion appeared, in a word, to be motivated, rather than compelled by the strength of the evidence and logical considerations adduced to sustain it.

Now, after this pivotal paragraph of his third draft, Jackson went on to rehash the arguments at the end of his second draft (1) that increasingly common racial mixing "baffles any justice in a segregation effort" and (2) that "the concept of the place of public education has changed" from "a privilege" to "a right of the citizen and a duty enforced by compulsory education laws." Nonetheless, these considerations are non-judicial: Jackson did not purport to derive any constitutional or legal consequences from them. They are simply arguments that show that segregation is unjust, but not that segregation is thereby unconstitutional. In the end, Jackson's judicial case for invalidating segregation rested entirely on the rational basis argument.

PRETTYMAN'S RESPONSE

At some point in the spring of 1954, Jackson asked his sole law clerk, E. Barrett Prettyman, III, to read the final draft of the *Brown* memo and offer his thoughts. In response, Prettyman composed an eight-page memorandum. Prettyman's recurring themes were that Jackson's memo

lacked conviction and that the justice should rewrite it to remove any doubts as to his sincerity or as to whether he had complete faith in the result he reached. Particularly troubling to Prettyman was the sheer amount of space that Jackson had devoted to all of the factors pointing to an affirmance of *Plessy*, an impression which could not, Prettyman argued, but have the effect of undermining Jackson's case for finding that segregation was unconstitutional. "You have stated this position [Jackson's rational basis argument for invalidating segregation] in only two out of 23 pages, and these two pages are almost at the end of the opinion," Prettyman observed. "They are almost an afterthought. It is one thing to have and express many doubts about a difficult decision, as any honest man would in this case; it is another to state them at such length and in such precedence over your affirmative views that the result you reach is swallowed up in them."[396] Prettyman consequently encouraged Jackson to recast the memo to center upon the rational basis argument for invalidating segregation. "I think your opinion should begin, not with doubts and fears -- not with a negative attitude, but with a clear and affirmative statement of your legal position,"[397] Prettyman wrote. "I say this in all frankness: if you are going to reach the decision you do, you should not write as if you were ashamed to reach it."[398]

Prettyman was working from a different version of the memo than any of the three I have analyzed here. Nonetheless, there is a clear correspondence between the outline Prettyman wrote of Jackson's memorandum and the third draft examined here: the draft Prettyman scrutinized appears to have been reorganized, but is substantively similar to the March 1, 1954 draft (Draft 3) examined in this chapter. Prettyman's outline is as follows.

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[396] Undated Prettyman Memorandum, E. Barrett Prettyman, *The Papers of E. Barrett Prettyman, Jr., 1944-1982*. Special Collections of the Arthur J. Morris Law Library, University of Virginia School of Law [emphasis in the original].
[397] Ibid.
[398] Id., at 3.

(1) Pp. 1-4 are primarily a plea to the majority of the Court to understand the South's position and not to act rashly.

(2) Pp. 5-10 show that the history of the 14th Amendment is inconclusive, and that it does not support the conclusion that segregation has always been unconstitutional.

(3) Pp. 11-17 concern enforcement of the Court's decision.

(4) Pp. 18-20 revert back to the idea that segregation has not been unconstitutional up to the present time.

(5) Pp. 20-23 contain the meat of the opinion: there is no longer a legal basis for separate but equal facilities.[399]

The correspondence between the draft Prettyman examined and the March 1, 1954 draft (Draft 3) is as follows:

(1) same;

(2) same;

(3) corresponds to Section IV., "Judiciary No Medium of Social Transition" of Draft 3 (pp. 15-19), and Section V., "The Decree" of Draft 3 (pp. 19-23), detailed in Chapter 8, below;

(4) corresponds to the first half of Section III, "Limits of Judicial Action" of Draft 3 (pp. 10-12);

(5) corresponds to the second half of Section III of Draft 3 (pp. 12-15).

Using the above correspondence table, it is possible to ascertain to which sections of Draft 3 Prettyman's comments were directed.

[399] Id., at 2.

Prettyman insisted that Jackson state his rational basis case for invalidating segregation (Draft 3, pp. 12-15) first and "expand your ideas." "Right now," Prettyman wrote, "this section is broken down into three basic premises: (a) the Negroes have overcome their old handicap; (b) the white and colored races are becoming assimilated; (c) public education is no longer for the privileged view." Prettyman recommended expounding upon the last point:

> More people are becoming educated at public expense (and otherwise) today than at any other time or in any other country. The United States has adopted Jefferson's great dream -- lock, stock, and barrel. This is not a single experiment engendered by good times; it runs through our whole history and is perhaps the source of our greatest power. Mass education, for <u>all</u> people, is simply an established fact in this country today.

"[A]gainst this background," Prettyman contended, Jackson should contrast the educational and legal situation of blacks in the United States: "we face the assertion of some states that the races are so unequal and so distinct that they must receive this education separately." This challenge can be met by "show[ing], as you do, that the races are no longer sufficiently unequal or distinct to warrant" segregation in education. Prettyman concluded, "[t]he fact that you cannot explain exactly how you know the races are sufficiently equal or that you cannot say just when they reached sufficient equality should not make your opinion apologetic. Someone must make these decisions, and under our system the burden is on the courts."[400]

This last comment demonstrates that Prettyman detected Jackson's uncertainty about the memo's rational basis scrutiny case for overturning segregation. By implying, in his straightforward endorsement of it, that the belief that many blacks had reached parity with whites was widely shared, and by stating explicitly that "the burden" of making such judgment calls in the American

[400] Id., at 3.

system falls "on the courts," Prettyman evidently sought to assuage his boss's discomfort with predicating an argument upon empirical claims that the justice himself could not measure or corroborate. These reassurances, however, probably had little effect on Jackson's view of his memorandum's persuasiveness.[401] Moreover, Prettyman's subsequent analysis may have exacerbated Jackson's doubts. Prettyman went on to say, correctly, that "the most important part of the opinion … is that dealing with the question whether there is any longer a valid basis for a classification based upon race alone." The clerk stated that his boss had "hinted at a theory" in his rational-basis argument that Prettyman argued should be more fully developed. Trying his hand at such an elaboration, Prettyman wrote:

> We are dealing with a situation in which several millions of persons have been placed in one class for purposes of education. It is questionable whether you could demonstrate that a majority of these persons no longer have the attributes which were once thought to be a sufficient basis for separate classification. That's a point which many Americans will feel weakens your case. Your answer can be this: The telling fact is not that some Negroes are still backward but that others are so highly advanced. Whether their progress has been because of or in spite of segregation, the fact is that they have arrived at a status on par with whites. If this is true, race alone indicated nothing in a field such as public education. It cannot be the yardstick, because it no longer marks any true differences between persons seeking an education. The colored people have shown that race is not a barrier, or is a barrier which can be overcome by the same type of endeavor practised by white persons. The advanced Negroes have proved that race alone is not what has kept back their fellows.

[401] See comment below by Frankfurter at fn 404.

That fact has finally become so demonstrable by the achievements of many Negroes that classification based upon race alone becomes inexcusable.

Prettyman's concession in the second and third sentences is the one that must have most bothered Jackson: the empirical claims underlying the rational scrutiny argument were simply too open to contestation to serve as a secure basis for overthrowing as much precedent and history as segregation had behind it. Jackson likely sensed that to pronounce that he had, in his judicial omniscience, determined that blacks were now on par with whites, would not only present a totally unpersuasive claim to many Americans with deeply-rooted prejudices and opinions on the race question, but also rely on precisely the kind of "elusive psychological and subjective factors" that the justice had decried in the first two drafts of his *Brown* memorandum.[402] Jackson probably could not escape the feeling that his rational basis argument rested on his own subjective impressions, and as such depended for its success upon factors "not determinable with satisfactory objectivity or mensurable with reasonable certainty." It is probable that Jackson recognized that the logical crux of his draft concurrence could not escape the smack of rationalization or the appearance of a judicial *deus ex machina*.

Prettyman's attempt to "answer" the objection he anticipated was no less convincing than the subjective personal impressions of the judge upon which the argument would be seen to depend. Prettyman's counterargument was unlikely to persuade anyone who objected to Jackson's claim that blacks had reached parity with whites, for it did not directly refute the thrust of those demurrals: that is, that blacks *on average* had not attained educational or social parity with whites.

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[402] As Jackson wrote in Draft 2, "if all the woes of colored children would be solved by forcing them into white company, I do not think we should import into the concept of equal protection of the law these elusive psychological and subjective factors. They are not determinable with satisfactory objectivity or mensurable with reasonable certainty. If we adhere to objective criteria the judicial process will still be capricious enough."

"The telling fact is not that some Negroes are still backward but that others are so highly advanced…. If this is true, race alone indicated nothing in a field such as public education." Regardless of accuracy, the argument was likely to "convince" only those who were already predisposed to accept it (i.e., fellow mid-century liberals), not those who would passionately resist integration, no matter how equal whites and blacks could be proven to be. Though Jackson did not leave behind any records indicating his reaction and response to Prettyman's memo, he was certainly a sufficiently wise man and adept political actor to have been aware of these problems. Perhaps the best evidence that Jackson found his clerk's suggestions unconvincing is that he never revised the memo to incorporate them, although Jackson's failure to do so is probably attributable in part to the heart attack that felled him a mere 15 days after the fourth and final draft was completed.

The beginning of Prettyman's memo to his boss contained what was, in effect, the memo's conclusion, so I have saved it for the end of my analysis. Prettyman wrote:

> To me, the single most important thing about the Court's decision -- perhaps more important than what it holds -- is that the country as a whole accept it. I don't mean "accept it" in the sense that the mass of people will immediately put it into practice; I'm not that unrealistic. I mean they should be made to feel that the decision is honestly arrived at, confidently espoused, and basically sound. They should feel that it expresses certain truths, even if they aren't quite fully prepared to accept fully those truths themselves or to practice them. And they should feel, as far as possible, that it is a decision based upon law. If they receive the decision in this way, segregation should die in relatively short order, no matter how many legal skirmishes ensue. On the other hand, if the country feels that a bunch of liberals in Washington have finally foisted off their social views on the public, it will not only tolerate but aid circumvention of the decision.

This description captures, better than its author probably knew, the dilemma Jackson faced. Jackson was motivated to end desegregation, less because he was emotionally bound up in its injustice than because he wanted to be on the ascendant "side" of social and political developments, to "go along" with the purveyors, on the Court as well as in broader American society, of "responsible and rational public opinion." This seems to be the net effect of his comments in his March 1950 exchange with Fairman, at the *Brown* conference in 1953 that he was not "personally" opposed to desegregation, and in his memorandum drafts that "responsible and rational" moral opinion on race had evolved. At the same time, Jackson appeared to feel the pull of his judicial duty more powerfully than any justice other than perhaps Frankfurter. The judge, Jackson believed, engages in a characteristic and specialized activity known as the judicial process, and the legitimate sphere of inputs to that process is circumscribed to traditional "judicial" considerations, which do not include sociological theories or "changes in men's feelings for what is right and just." It is for this reason that Jackson attempted to take the only path——rational basis scrutiny——that his judicial temperament would allow with respect to overturning segregation. In invoking that judicial mechanism, Jackson felt compelled to articulate precisely what about segregation in 1954 ran afoul of the Court's existing equal protection doctrine: that contemporary black progress toward parity with whites in all aspects of human endeavor belied a reasonable basis for differential treatment in education. Thus, Jackson engaged with the constitutional questions in *Brown* at a lower level of abstraction than that at which most of the other justices did. His resulting analysis was consequently more traditionally "judicial"——and less obviously mediated by simple moral intuitions that segregation is unjust and offensive——than that of any other justice.

Prettyman's opening paragraph also provides a sample of the kinds of pressures and arguments by which Jackson was no doubt being buffeted, pressures emanating from private acquaintances with whom he discussed the case, from his fellow Brethren, and from two of his three law clerks[403] in the two terms in which *Brown* was argued on the merits. "To me, the single most important thing about the Court's decision -- perhaps more important than what it holds -- is that the country as a whole accept it." Warren and Frankfurter——who, along with Jackson, were two of the three central figures in the *Brown* decision-making process——also superseded the goal of public acceptance to judicial reasoning and pursued the former by seeking unanimity at the expense of a less than maximally persuasive and perspicaciously reasoned opinion for the Court. But as the protracted negative reaction and resistance to *Brown* in many parts of the country suggests, the potency of judicial persuasion and public acceptance of a decision are not entirely uncorrelated. Though he never put that thought into written words that survive to the present, Jackson seemed to have intuitively sensed this fact. Although it is possible only to speculate about how Jackson might have proceeded with his *Brown* memorandum had he not been incapacitated by a heart attack at the end of March, my analysis suggests he would not have taken Prettyman up on his suggestion to feign belief in a judicial opinion that, because it betrayed too clearly Jackson's ineradicable conception of the judicial process and his own judicial duty to abide it, could not yield a satisfactory defense of the outcome Jackson sought. For Jackson the jurist, conviction, even if genuinely felt, could not substitute for judicial substance. The two went hand-in-hand.

Frankfurter, Jackson's closest colleague on the Court, would remark of Jackson's struggles in *Brown* in a 1958 letter to Judge Learned Hand: "[t]he fact of the matter is that Bob Jackson tried

[403] Donald Cronson in '52 and Prettyman in '53 although not——as would famously emerge at Senate confirmation hearings in 1971——William Rehnquist, the second of Jackson's 1952 term clerks.

his hand at a justification for leaving the matter to §5 of Art. XIV, 'The Congress shall have powers to enforce, etc.' and he finally gave up."[404] This would seem to be an appropriate description of Jackson's months-long attempt to produce a "judicial case," circumscribed within the peculiar limits that he understood the judicial process to impose, for "a congenial political conclusion." Jackson never published his memo as a concurrence or produced a draft that varied substantially from Draft 3, although he did have on hand the fourth and final memorandum draft of March 15, when Warren visited him in the hospital in May to discuss the Chief Justice's draft *Brown* decision and request that Jackson join it. The central element of Jackson's rational basis scrutiny case—— the changed social conditions of blacks precipitated by their "spectacular" recent progress——made its way into Warren's final opinion for the Court, shorn of the rational basis significance Jackson had imputed to it in his memorandum drafts.[405] The single sentence that Warren incorporated as a result of that hospital visit appears at the point in the *Brown* opinion at which Warren distinguished public education at the time of the adoption of the Fourteenth Amendment from that of eighty years later. "Education of Negroes was almost non-existent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states," Warren wrote. Then: "Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world." After two rounds of arguments over two years and two months of memorandum writing, Jackson's single contribution to the final *Brown* opinion was a dictum that encapsulated the empirical crux of his own aborted judicial case for ending segregation.

[404] Schwartz (1983, 94).
[405] Kluger ([1976] 2004, at 701).

Chapter 8. Conclusion

The analysis of the preceding chapters has shown that eight of the nine justices who participated in the 1953 term *Brown* decision-making process——Chief Justice Warren and Justices Black, Frankfurter, Douglas, Jackson, Burton, Clark, and Minton——likely engaged in intuition-mediated moral judgments to reach their conclusion that segregation violated the Due Process and Equal Protection guarantees of the Constitution. Most, although not all, of their behaviors were consistent with the predictions of Haidt's model: that judgment of right or wrong (or constitutional or unconstitutional) would precede rationale, that the rationales adduced in support of the judgment would be weak relative to the strength of the judgment, and that the characteristic correlates of intuition-led judgment, such as confirmation bias and motivated reasoning, would be detectible in the justices' decision-making processes. The eight justices whom I have identified were motivated to invalidate segregation, in whole or in part, due to psychological phenomena described by the SI model of moral decision-making.

THE OUTLIER

While Justice Reed fits the SI model quite closely as well, the analysis thus far does not explain how he came to vote with the other justices, since he appeared from his conference comments to wish to sustain, not overturn, enforced segregation. Like Frankfurter, Jackson, and Clark, Reed ended up joining the other justices once it became clear there was a majority to order desegregation. Unlike Frankfurter, Jackson, and Clark, however, Reed took his time in doing so and evidently possessed a moral preference for segregation. Reed believed that segregation was basically benign in its effects on blacks and innocuous or even positive as a symbol of whites' attitudes toward blacks; that, if segregation was to fall, Congress in its power to set social policy for the

nation, and not the Court in its power to expound the Constitution, should strike the fatal blow;[406] and, as would emerge in his conversations with his 1953 term law clerk John Fassett, if the Court nevertheless ignored Reed's appeals to judicial restraint, that segregation should be invalidated on Due Process, not Equal Protection grounds.[407] Ultimately, Reed was likely motivated to join the others, because, at least by the accounts of those who knew him, he was a "team player" and highly responsive to the pull of judicial solidarity. Some years before *Brown*, for example, Frankfurter had remarked that "Reed was a soldier and glad to do anything that the interest of the Court might require."[408]

Fassett's recollections of Reed's actions in the 1953 term also suggest that Reed's primary motivation for making a unanimous Court in *Brown* was his powerful sense of duty to the institution. For instance, Fassett recalled that once the outcome of the case became clear at the 1953 conference, Reed stopped working on a draft dissent he had been preparing since the previous summer. Though Reed made it clear to the other justices that he disagreed with the outcome, Fassett recounted, "I'm sure, if he had not expressly said so, he impliedly said so, to the other Justices, that he would go along if it was an opinion that was acceptable."[409] The consensus in the *Brown* scholarship that Reed ultimately joined the Warren opinion out of a sense of institutional loyalty seems, therefore, to be correct. Kluger, relying on an anecdote of Reed's other 1953 term clerk, George Mickum, suggests that Reed refused to join the other justices until late April or early May of 1954, and was persuaded only after a dramatic meeting with Warren in which Warren highlighted Reed's isolation. Warren is purported to have said, "Stan, you're all by yourself in this

[406] Fassett et al. (2012, 532-533, 555), Kluger ([1976] 2004, 696).
[407] Fassett et al. (2012, 555), Schwartz (1983, 100).
[408] Klarman (2004, 302).
[409] Fassett et al. (2012, 555).

now. You've got to decide whether it's really the best thing for the country."[410] However, Fassett contends that this meeting never took place. "The one supposed occurrence of Warren and Reed and a law clerk that appears in Dick Kluger's book *Simple Justice* I'm convinced is erroneous," Fassett said. "And the fellow who is identified there as doing it [Mickum], has denied that he said so."[411] Accordingly, contra the traditional *Brown* narrative that Reed was only persuaded to join the other justices in late April or May, it is possible that Reed had begun to signal that he would be willing to join the other justices shortly after the second *Brown* conference, provided the decision were written in an "acceptable" way.

It is highly probable that Reed's opposition to the constitutional merits was softened, although not extirpated, by the psychological phenomenon of group polarization. Warren, a highly charismatic master persuader and consummate political operator, was evidently familiar with this effect. In order to achieve unanimity, he deliberately tried to engineer group polarization among the justices (1) by not taking a vote on the merits until well after a consensus had congealed, (2) by pursuing a strategy of group luncheon persuasion with respect to Reed (and to a lesser extent, perhaps Clark), and (3) in the words of a December 17, 1953 entry in Harold Burton's diary, by "direct[ing] discussion of segregation cases toward a decree," i.e., remedy, "as providing now the best chance of unanimity in that phase."[412] Regarding the first point, twenty years after *Brown* Warren remarked to Kluger that "we decided not to make up our minds [on *Brown*] on that first conference day, but to talk it over, from week to week, dealing with different aspects of it – in groups, over lunches, in conference. It was too important to hurry it."[413] Too important, and, more

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410 Kluger ([1976] 2004, 702).
411 Id., at 547.
412 Schwartz (1983, 90).
413 Kluger ([1976] 2004, 686).

importantly, too likely to produce an outcome other than unanimity had the justices' customary practice of stating their positions at conference been abided.

The second point is demonstrated by the lunch group that Warren put together and regularly convened throughout the 1953 term as a forum for discussing *Brown* and fomenting unanimity. According to Ulmer, Warren's luncheons were regularly attended by Burton, Reed, Clark, Douglas, and Minton; "Frankfurter and Jackson never attended, and [] Black joined the group only infrequently."[414] Reed apparently lunched with Warren and Burton, the core members of this group, "at least 20 times" between the second *Brown* conference and May 8:[415] a raw average frequency of once every eight days, though taking Court's Christmas and New Year holidays and mid-February breaks into account would drop that frequency to well within once per week. The membership of that luncheon group included four justices (Warren, Douglas, Burton, and Minton) who had brooked no doubt at conference that segregation was unconstitutional. Then there was Clark, who, though he said he did not like segregation and would vote to invalidate it at the second *Brown* conference, would have benefited (from the perspective of unanimity) from the attitude consolidation available by means of group polarization, especially as regarded his worries about the South's reaction. Reed, finally, would have been totally outgunned in his reading of the history of the Fourteenth Amendment and segregation's innocuousness. In light of the literature on group polarization, it is highly unlikely that these regular meetings did not move Reed's position on segregation closer to those of the others.

Finally, by calling a conference to discuss remedy (as opposed to an additional meeting to further consider the *Brown* merits) on January 16, 1954, only a month after the 1953 *Brown* merits

414 Ulmer (1971, 698 fn 17).
415 Id., at 699.

conference, Warren sought to incorporate Reed into the overall *Brown* decision-making process despite Reed's stated opposition to the outcome favored by the Court majority. The effect of this was to acclimate Reed to the normalcy and inevitability of the Court's decision to overturn segregation. "Continued discussion of the *decision* [on the merits] would only polarize potential concurrers and dissenters, solidifying their intention to write separate opinions," Schwartz observes. But,

> [b]y concentrating instead on the *remedy*, all the Brethren would work on the assumption that the decision itself would strike down segregation. They would endeavor jointly to work out a decree that would best effectuate such a decision. Those who, like Reed, found it most difficult to accept a decision abolishing segregation, would grow accustomed to what might at first have seen too radical a step.[416]

A year after the *Brown* merits decision, Warren would step back and take stock of his own handiwork. "The fact that we did not polarize ourselves at the beginning gave us more of an opportunity to come out unanimously on it than if we had done otherwise," he told an interviewer.[417] In a September, 1955 memo to the other justices, Frankfurter too highlighted the significance of the suspension of Court custom in *Brown*. That case was the only one "in which we postponed a vote after argument for further study. The exception is significant. Who will deny that this maturing process in the segregation cases full vindicated itself?"[418] Warren and Frankfurter were thus cognizant of the group polarization phenomenon, if only by effect, and sought to employ it to achieve unanimity in *Brown*.

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[416] Schwartz (1983, 91).
[417] Id., at 84-85.
[418] Id., at 85.

BROWN'S REASONING

Over the course of its 13-page 1952 brief in the titular *Brown* case, the NAACP claimed in four separate places[419] that enforced racial segregation violates both deontological and utilitarian moral principles. One representative statement occurs in the "Summary of Argument" section of the brief.

> Racial segregation in public schools reduces the benefits of public education to one group solely on the basis of race and color and is a constitutionally proscribed distinction. Even assuming that the segregated schools attended by appellants are not inferior to other elementary schools in Topeka with respect to physical facilities, instruction and courses of study, unconstitutional inequality inheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school from the general public school population. Such *injury* and *inequality* are established as facts on this appeal by the uncontested findings of the District Court.[420]

Though it has consequentialist implications, the first sentence is a deontological argument: *de jure* racial segregation deprives blacks of equal opportunities and amounts to treating one group differently from another without a rational basis for doing so. The second sentence, on the other hand, argues that the violation of deontology entails consequentialist harms: the message of inferiority conveyed by segregation distorts blacks' personalities and retards their educational achievement. The third sentence contends by way of summation that segregation produces both deontological and consequentialist harms. The enforced separation of blacks from whites on the basis of race

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[419] 1952 Brief for Appellants in *Brown v. Board of Education*, once each at 4-5, 5; twice at 10. (Emphasis added).
[420] Id., at 5.

generates a feeling of inferiority, which is to say that segregation by law symbolizes blacks' inferiority and communicates it to white and black students alike. This is a deontological argument: the symbolism or state endorsement of racial inequality cannot be reconciled with universalism and its moral core, the golden rule. The second part of the sentence is consequentialist: the proximate effects ("feelings of inferiority") of such symbolism cascade to real-world harms to black children's psyches and self-esteem, as well as, presumably, to their educational performance.

The NAACP's dual deontological-consequentialist critique was adopted by Warren in his decision for the Court. As we have already seen, Warren contended that "[t]o separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[421] Warren apparently lifted this language, with minor modifications, from another part of the 1952 NAACP brief in *Brown*. After quoting Finding of Fact No. 8 of the Kansas federal trial court, which was also incorporated verbatim into the final *Brown* opinion,[422] the NAACP brief declares:

> The testimony [in the Kansas federal trial court] further developed the fact that the enforcement of segregation under law denies to the Negro status, power and privilege (R. 176); interferes with his motivation for learning (R. 171); and instills in him a feeling of inferiority (R. 169) resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society (R. 165).

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[421] See fn 70, *supra.*

[422] 1952 Brief for Appellants in *Brown v. Board of Education*, at 8-9; see fn 80 and discussion, *supra*.

This sentence was, no doubt, the basis for the dispositive passage in the *Brown* opinion that begins with "Such considerations [those espoused in *Sweatt* and *McLaurin*] apply with added force to children in grade and high schools," and concludes with footnote 11.[423]

The paradox of Warren's deployment of this line of argumentation in the final *Brown* opinion is that, as Chapters 4, 6, and 7 of this work demonstrate, the psychological harms of segregation on blacks did not predominate among the objects of the justices' concerns recorded in the surviving primary source record. Warren's position at the 1953 conference reflected deontological, more than consequentialist sensibilities: *Plessy* and segregation can only be sustained on the basis of "white supremacy" and should be overturned for that reason, not because segregation necessarily concretely harms blacks. Black noted that he did "not need books"[424] to tell him that segregation is predicated on the white Southerner's belief in "Negro [] inferior[ity]"——again, a symbolic or deontological argument without explicit reference to real-world harms on blacks. Reed emphatically contended that segregation cannot be invalidated on utilitarian grounds, arguing it was benign in provenance and effect. With his anecdotal reference at the 1952 conference to the "trouble" Mexican boys and black girls sometimes find themselves in, Clark seemed to share Reed's view of segregation's benign character. However, a year later, after changing his mind on which way he would vote, Clark presented no argument against segregation and limited himself to the pronouncement that "he doesn't like it." Frankfurter was able to articulate what was so offensive about segregation——its *symbolism* of black inferiority——in the *Henderson* discussions[425] but did not, so far as the primary source record shows, in the *Brown* decision-making process. Douglas adduced the conclusion of a deontological anti-classification argument at both conferences but, as

[423] 347 U.S. 483, at 494.
[424] Hockett (2013, 65).
[425] *Henderson v. United States*, 339 U.S. 816 (1950). See Hutchinson (1980, 28).

was his wont, declined to bolster it with further reasoning or analysis. Jackson acknowledged the "disadvantaged" status of blacks he went to school with as a child and speculated that they "must have felt [segregation's] sting" despite being not legally subject to it. This claim, of course, is more deontological than consequentialist: knowledge of *de jure* segregation demotivates because of its symbolism, but enforced segregation does not directly affect the blacks not subject to it. Last, Burton and Minton each employed anti-classification arguments at the conferences and, like Warren and Jackson, pointed to anecdata adduced to demonstrate that whites and blacks had achieved substantial "equality" in the real world. In sum, at the *Brown* merit conferences, seven of the justices (Warren, Black, Frankfurter, Douglas, Jackson, Burton, and Minton) adduced deontological arguments against segregation; two (Clark, in 1952; Reed, at both conferences) advanced consequentialist *defenses* of segregation that attempted to refute segregation's harms. Yet Warren's invocation of the NAACP's dual deontological/consequentialist reasoning, his recitation of Finding of Fact No. 8 of the Kansas federal trial court that first heard *Brown*, and his reference in Footnote 11 to five psychological studies presented by the NAACP, elevate consequentialism from a latent afterthought of the justices' conference discussions into the argumentative core of the *Brown* decision. Why did Warren rely upon, and why did the other justices sign off on, a consequentialist constitutional rationale when the character of the justices' reasoning in the actual decision phase of *Brown* focused more on segregation's symbolism or violation of deontology than its practical harms?

I believe there are two reasons. The first is that the arguments employed in the final opinion were secondary, and not primary, concerns for all nine justices. This is a direct consequence of the fact that the justices' decision-making conforms to the social intuitionist model and that model's

implications for the provenance and character of judgment. For Warren, Black, Frankfurter, Douglas, Jackson, Burton, Clark, and Minton, the judgment that segregation was unconstitutional was likely caused by the moral intuitions those justices experienced regarding segregation's injustice or immorality. The weakness and incompleteness of these justices' judicial rationales for their decisions, in my view, demonstrates that moral intuitions or other affective responses, not reasoned or deductive analysis, caused those judgments in the first place. The constitutional or judicial "reasons" that each justice presented to support the outcome therefore did not matter as much to the justice espousing them as the judgment itself, since the rationales were a consequence, not a cause, of the judgment. Accordingly, all the justices——even Reed, who went along with the others not because he agreed on the merits, but out of institutional solidarity——were extremely flexible on the question of rationale and were thus amenable to adopting constitutional reasoning in the *Brown* opinion that no justice had advanced in support of his position in conference.

It is revealing that every justice who spoke in favor of ending segregation (with the exception of Clark in 1953) attacked segregation as inconsistent with one or more deontological moral principles (universality, reciprocity, "reasonableness," etc.), and two of the three justices who defended segregation (Reed and Clark) did so on a consequentialist basis——that is, by denying that segregation harmed blacks. Vinson, the third justice who spoke in favor of sustaining segregation, was the only one to confine himself to legalism and not take a position on segregation's justice or morality. Of course, deontological moral decision-making usually has an affective basis,[426] so the justices who presented deontological claims likely did so because of their moral intuitions. Moreover, that seven of the nine justices who decided *Brown* in 1954 adduced deontological reasons to

[426] Greene et al. (2001); Greene et al. (2004).

condemn segregation but then signed on to an opinion that spoke almost exclusively of its consequentialist harms evinces the degree to which those deontological reasons were the reasons for and causes, as opposed to *post hoc* rationalizations,[427] of the justices' judgments. Of course, it might be objected that the justices' willingness to ground *Brown* in consequentialism rather than deontology does not necessarily indicate that the deontological arguments that the justices advanced at the *Brown* conferences did not *cause* the judgments the justices expressed there. That is true. But I contend the justices' evident flexibility with respect to the rationale for overturning segregation in the final *Brown* opinion does show that the justices' deontological conference arguments were not inextricable from and essential to the justices' judgments of unconstitutionality. If those arguments had been, the justices presumably would not have accepted a rationale very different the arguments expressed at conference. The inference that the justices' conference arguments were not vital to the justices' conference positions on the *Brown* merits, then, corroborates my contention that the social intuitionist model explains the justices' underlying decision-making.

The second reason that consequentialism became the persuasive core of the final *Brown* opinion is that it alone permitted Warren to achieve his goals in writing the opinion. One of his goals was, obviously, to announce the result. A particularly prosaic and uninspiring statement of the outcome, which reveals more about the decision's etiology than perhaps the statement was intended to, appears after the opinion's reasoning has been exhausted: "We have now announced that such segregation [that is, in public education] is a denial of the equal protection of the laws."[428] (Kurland cites this dictum as evidence of the Court's unjustified reliance on its own "*ipse dixit*.")[429]

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[427] Almost all certainly unconscious, i.e., without the justices' awareness that those reasons did not directly *cause* their judgments.
[428] 347 U.S. 483, at 495.
[429] Kurland (1979a, 317).

Another of Warren's goals, according to the brief cover memo affixed to the opinion drafts he circulated to the justices on May 8, 1954, was to write the *Brown* and *Bolling* opinions to be "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory"[430]——a strategy the Chief Justice believed would facilitate disposing of the cases with a "minimum of emotion and strife."[431] Essential to minimizing the "emotion and strife" that the decision was bound to precipitate was to write in a way, and incorporate reasoning, that would induce those who might disagree with the outcome to accept or at least acquiesce in it. Finally, and perhaps as the most important means of "minimi[zing] emotion and strife," Warren sought to avoid explicitly overruling *Plessy*. Though there is no record of the justices discussing this goal in the spring of 1954, Warren pursued it consciously. We know this because E. Barrett Prettyman related that during a hospital visit to Jackson on May 10, Warren informed Jackson of his desire not to overrule *Plessy* or overturn segregation generally (outside of educational contexts) in the *Brown* opinion, and Jackson endorsed Warren's strategy.[432] As such, it is highly probable that a majority of the other justices knew about, discussed, and agreed to this approach as well.

A consequentialist framework was the only available judicial means of achieving these objectives. The justices must have recognized that virtually every deontological argument against segregation would threaten one or more of these goals, for any deontological rule capable of invalidating segregation could not be circumscribed to enforced segregation in public primary and secondary schools. A deontological rationale would instead necessarily encompass race-conscious

[430] May 7, 1954 cover memo to *Brown* and *Bolling* draft memoranda. Tom C. Clark Papers, Box A27, Folder 4. Tarlton Law Library, The University of Texas at Austin.
[431] Kluger ([1976] 2004, 682).
[432] See fn 68, *supra*.

government action, such as anti-miscegenation laws, that still enjoyed overwhelming public support due to deeply engrained prejudices. Klarman notes that opinion polls in the 1950s indicated that some 90% of whites in the United States as a whole, not just in the South, opposed mixed-race marriages.[433] For the Court to be perceived as overturning anti-miscegenation laws when a majority of whites was viscerally opposed to extending that degree of social equality to blacks might have seriously handicapped its already-limited institutional capacity to induce compliance with its eventual command of token desegregation in public schools.[434] Given the strategic objectives Warren harbored and the other justices evidently approved, and in light of the justices' relative indifference to the judicial reasoning employed, a consequentialist approach was the obvious choice for the final *Brown* decision.

Warren's procedure for composing opinions was in close keeping with the justices' apparent flexibility (or indifference) toward the ultimate reasoning employed in *Brown*. According to Schwartz,

> [a]fter the conference vote and assignment of opinions, Warren would discuss any opinion he had assigned to himself with the law clerk selected to draft that opinion, normally the clerk who had written the bench memo on the case. Warren would usually outline verbally (though in important cases he would dictate the outline to Ms. McHugh) the way he wanted the opinion drafted. Most of the time, the outline would summarize the facts and how the main points should be decided. The Chief would rarely go into particulars on the legal

[433] Klarman (2004, 321).

[434] Frankfurter acknowledged this unfortunate reality in 1955, when weighing whether the Court should note probable jurisdiction in *Naim v. Naim*, 87 S.E. 2 d 749 (1955), a constitutional challenge to Virginia's anti-miscegenation statute. Frankfurter wrote to the Brethren: "to throw a decision of this Court other than validating this legislation into the vortex of the present disquietude [over *Brown*] would … seriously, I believe very seriously, embarrass the carrying-out of the Court's decree of last May [*Brown II*]" Kull (1992, 159).

> theories involved in the case. The clerk was left with a great deal of discretion on the details of the opinion, particularly the reasoning and research supporting the decision.[435]

This aspect of Warren's approach to the judicial process reinforces the overwhelming impression that Warren's "ultimate human values" method of judicial decision-making was reducible to the social intuitionist moral one. At the very least, traditional "judicial" or legalist considerations were not dominant inputs to Warren's version of the judicial process. After receiving the clerk's draft, "Warren would normally go over [it] with the clerk who had written it. Particularly where he was dissatisfied with a section, he would discuss it in detail." Otherwise, his revisions were confined to stylistic changes. Reflecting upon Warren's opinion-writing process, Schwartz contends that

> Warren never pretended to be a scholar interested in research and legal minutiae. These he left to his clerks, as well as the extensive footnotes which are part of panoply of the well-crafted judicial opinion. One year the clerks snickered with delight when they ran across a learned law-review article, analyzing an important Warren opinion, in which the author saw great significance in the order in which Warren cited cases in the footnotes. The clerks knew that was utterly foolish, because nobody (and certainly not the Chief) had paid any attention to it.[436]

In accordance with what would prove to be his normal opinion-writing procedure, toward the end of April, 1954, Warren began composing an outline of the *Brown* and *Bolling* opinions; the *Brown* decision outline "contained some language that Warren wanted in the opinion," including the dual deontological-consequentialist statement quoted near the beginning of this discussion,[437] which made its way verbatim into the final *Brown* opinion. Warren then delegated the

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[435] Id., at 68.
[436] Ibid.
[437] See fn 421, *supra*.

actual drafting of the opinions to his three law clerks. "Earl Pollock was to work on the opinion in the state cases; William Oliver was to have the primary responsibility for the case involving segregation in the District of Columbia; Richard Flynn helped on both opinions, particularly in" adding footnote citations.[438] "The draft prepared by Pollock from Warren's outline," Schwarz explains, "was basically the opinion read by the Chief on May 17."[439] The presence and content of Footnote 11 were both Flynn's ideas, although Warren of course accepted them.

From Saturday, May 8, to Saturday, May 15, the other justices read and discussed Warren's drafts in *Brown* and *Bolling*. Jackson signed on to the opinions on May 10. After suggesting a few minor revisions to wording, the other seven justices joined the opinions at a justices' conference on May 15. Two days later, on Monday, May 17, the Court's unanimous decisions in *Brown* and *Bolling* came down.

WHAT *BROWN* DECIDED

> … I ask the reader to ponder why the Brown opinion was so wanting in reason. For myself, I thought that the answer was to be found in the proposition that I have been reiterating: "*Brown v. Board of Education* was the beginning." And so, the Court did not mean *Brown* to determine or even to suggest the answers to the myriad of legal problems that would flow from its revolutionary decision to strike down Jim Crow, at least in public school classrooms. Time and experience would be necessary for a fuller delineation of constitutional principles.[440]
>
> —Philip Kurland

[438] Schwartz (1983, 96).
[439] Id., at 97.
[440] Kurland (1979a, 318).

> [T]he big picture of Brown was not just public school desegregation. It was the cornerstone for dealing with racial equality in all areas, and as a former corporate executive, for example, what it meant in the employment patterns of companies. I had the first two black directors on my board of directors after I became the head of an electric company. And in politics, you see black people at the top level and in the legislatures. You see it in every area of our society. That all goes back to *Brown v. Board of Education*.[441]
>
> —John Fassett

> We sometimes hear comments that the promise of *Brown v. Board* has not been realized. You really have to ask the question, 'Well, what was that promise?' *Brown* did not promise the end of racism, although I think that Brown has had a profound effect in reducing racism as the separate walls have, to a great extent, at least when compelled by state law, have been broken down. *Brown* did not promise the end of discrimination, which is still, undoubtedly, a national plague that has to be addressed whenever we can. And *Brown* did not promise integration. What *Brown* was all about was a matter of attacking compelled segregation under law. It was not aimed at creating racial balances in our institutions. It was not intended or designed as an end to the horrendous black poverty that continues. It had a very important target, which, I think, it very successfully addressed. And that is ending the blight of post-slavery segregation compelled by state law. So from my perspective, I think the promise of *Brown* has been now realized and that it, I think, deserves its prominence which we are celebrating here today as very possibly the most important decision in the history of the Supreme Court.[442]
>
> —Earl Pollack

The justices who participated in the *Brown v. Board of Education* decision-making process took their bearings not from any constitutional good, but from a moral evil: legally enforced racial

[441] Fassett et al. (2012, 565).
[442] Id., at 566.

segregation. In identifying, discussing, and studying that moral evil, they reached the consensus that the Constitution commanded overcoming it. They did not, however, succeed in delimiting the precise contours of that moral evil, transformed by unanimous agreement into a constitutional one, or the commands or restrictions of the Constitution with respect to a host of comparable and associated phenomena. This analysis has shown that the judicial observation of segregation's psychological harms that seems to form the basis for the *Brown* decision was in fact a kind of useful strategic decoy chosen by the justices to enable them to invalidate legal racial segregation and go no further. Nevertheless, the negative orientation implied in starting from an evil and working one's way backward to a constitutional good, does, I believe, tell us something more specific about *Brown*'s constitutional holding than can be gleaned from the words of the opinion alone.

If *Brown*'s negative orientation toward segregation mirrors Hobbes' negative orientation toward violent death, then its constitutional holding parallels Locke's imperative of substituting a common and impartial judge for the lawlessness of the state of nature. *Brown* announces, in other words, that the Court, not the people or their representatives, shall judge: judge what is and is not "equal protection of the laws"; judge what the remedies are to its violation; judge who wins and who loses in the gradual unfurling of the new equal protection regime. More than simply proclaiming a clean slate in the law of equal protection, though, *Brown* announces, by its own example, how the Court will go about superintending the growth and periodic pruning of "equal protection of the laws."

If *Brown*'s putative constitutional rationale was consequentialist, in contrast to the deontological arguments the justices propounded at conference, then the judicial decision-making process that produced the decision's rationale was meta-consequentialist. The justices who decided *Brown*,

having arrived at their judgment that segregation was unconstitutional——mostly by means of intuition-mediated moral reasoning——adopted whatever rationale would best combine and advance the moral consensus of the justices and institutional interests of the Court, instead of developing a judicial case that could act as a stable and rationally defensible basis for the new equal protection regime. The regime upon which the justices passed was one that might have convinced the public, in judicial terms, that it was more just and truer to the constitutional provisions it purported to expound than the regime it supplanted. *Brown*'s, in contrast, strategically served the justices' view of the Court's institutional interests.

Brown's legal holding is that the Equal Protection Clause is an authorization for a consequentialist judicial approach to constitutional law itself, as opposed to a warrant merely for judging specific cases before the Court by reference to a utilitarian calculus, as the written opinion implies. *Brown* announces that the judicial pursuit of racial equality and the Equal Protection Clause are one and the same. *Brown* thus inaugurates a new law of equal protection: that where there are not sufficient "judicial" resources to reach an outcome advancing the justices' conception of racial equality, that paucity can be overcome for the sake of the new, higher law: the imperative to pursue racial equality. Thus, the Court in *Brown* effectively decided the *constitutional ends justify the judicial means.* That "principle," it seems, is *Brown*'s judicial legacy.

This work has attempted to answer two questions. The first was, Why did the *Brown* decision lack a robust and generalizable theory of equal protection and refrain from articulating the specific constitutional rights that segregation violated? The answer is, because it was strategically advisable for the justices to go that route. My analysis shows, however, that the justices engaged in meta-consequentialist rationale-picking because they decided the constitutional question that

Brown posed by recourse to affective factors such as moral intuitions, which failed both to motivate robust rationales and to link inextricably the weak rationales the intuitions did succeed in motivating to the moral judgment that segregation was immoral or unjust. Because outcome and reasoning were severable in the justices' minds, the justices abjured their own initial deontological rationales and, in time for the *Brown* decision, found others that better served the strategic interests of the Court——waiting in the briefs, courtesy of the NAACP.

The second question this work sought to answer is, What constitutional harms does *Brown* condemn? On its face *Brown* dooms only *de jure* segregation. But the justices' intuitions, the real causes of the *Brown* outcome, condemned more: they censured the *symbolism* of racial inequality. As we have seen, seven of the nine justices expressed that opprobrium in deontological terms. But that is most likely because (1) deontological "reasoning" is in fact driven by affect, and therefore constitutes the most natural form of argumentation for people whose decision-making is driven by moral intuitions, and (2) per the social intuitionist model, when the justices grasped for available "concept resources," i.e., pre-existing, articulable rationales, to justify their judgments to each other, the primary ones available at the time were colorblind, deontological arguments. Incidentally, this would also explain why the NAACP at the time deployed colorblind legal theories: there were no other discrimination-enervating "argument-weapons" available. As soon as such concept-resources began emerging in the mid-1960s, however, the NAACP dropped the colorblind ruse and adopted a newly-minted "argument-weapon" that much more directly and precisely advanced its eponymous organizational objective of "Advanc[ing] Colored People": the contention that morality, *Brown*, and Congressional civil rights legislation all commanded special class-specific protections and provisions for the victims of racial discrimination, as opposed merely to the eradication of discrimination by law.

In like fashion, the justices in *Brown* recurred to deontology in their conference discussions both because their judgments were driven by affect and because there were no concept-resources that could more precisely and directly end segregation while advancing the Court's strategic interests. The paucity of such resources in the mid-1950s, as Jack Balkin noted, was due to the fact that "lawyers, judges, and legal scholars" had not yet "come up with novel and sophisticated theories,"[443] i.e., the persuasive, custom-tailored concept-resources or argument-weapons that the Court could have employed to reach its preferred outcome both as to the immediate facts and as to future action, while enshrining that outcome in the cloak of constitutional inevitability. The modern concept-resource the justices lacked in *Brown*, but most likely would have most desired, is the "anti-subordination principle" Balkin helpfully articulates. Had the anti-subordination principle been available to the justices who decided *Brown*, I have no doubt they would have used it in lieu of the actual reasoning Warren employed, for Balkin's principle is perfectly compatible with the *Brown*'s consequentialist constitutional rationale, and, more important, with the meta-consequentialist judicial approach the justices took to develop *Brown*'s consequentialist constitutional basis. After all, Balkin's anti-subordination principle is simply the meta-consequentialist reality of *Brown* given the imprimatur and sophisticated rebranding of legal scholars who have had decades to develop what the justices in *Brown* had only 18 months to produce. The *Brown* Court would have benefited from having the antisubordination principle, or concept-resource, in its arsenal. Thus, because the deontological arguments the justices propounded at the *Brown* conferences were simply post hoc rationalizations (as demonstrated by the fact the justices readily abandoned those reasons for the eventual consequentialist rationale deployed in *Brown*) and because the anti-subordination principle condemns the species of stimuli——i.e., apparently, stigmatizing treatment of

[443] See fn 40, *supra*.

blacks——that elicited the justices' moral intuitions that segregation was unjust, while leaving open a wide arena of judicial discretion, *Brown* espouses the antisubordination principle.

That this question nevertheless continues to be hotly debated today is due in part to a historical misconception of *Brown* dating back to Judge John Parker's dictum in the remanded *Briggs* litigation that the Court in *Brown* had limited its ruling to the determination that the "Constitution . . . does not require integration. It merely forbids discrimination . . . [i.e.,] the use of governmental power to enforce segregation."[444] Modern conservative legal scholars view *Brown* as announcing precisely these principles (in their most universal forms) and as thereby enshrining the deontological principle of colorblindness. While there is little doubt that the ultimate widespread acceptance of *Brown* by America's white majority turned upon Judge Parker's reading of the decision, the claim that *Brown* announces a rule of colorblindness is a mistake——one that, if not deliberately engineered by the Court in the *Brown* decision itself, has nevertheless served the Court's institutional interests beautifully for decades. For that mistake induced public acceptance and eventually sacralization of what is effectively a judicial carte blanche to improve the station and advance the interests of racial minorities as the Court judges prudent and proper. *Brown* does not stand for a constitutional rule of colorblindness any more than it stands for the idea that "separate but equal" remains permissible outside of public education. The Court did not say explicitly, but insinuated to those who were listening, that there was another way to pursue racial equality than by telling government to turn a blind eye to race.

Whether or not the Court intentionally misrepresented *Brown*'s holding to the lower courts it tasked with enforcing desegregation (later integration), the *Brown II* remedy decree contained

[444] Tushnet (1994, 241).

language that made Judge Parker's interpretation of *Brown* initially a plausible one. The first sentence of the decree reads, "Racial discrimination in public education is unconstitutional and all provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle."[445] The Court told the lower courts to which the cases were remanded to "take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed."[446] The term "racially nondiscriminatory" appears four times in the decree and accompanying opinion, and was the shorthand by which the Court referred to its holding on the *Brown* merits the year before. These are the dicta from which Judge Parker derived his interpretation, and those upon which colorblind constitutionalists latch as evidence of *Brown*'s deontological provenance. Of course, the instructive contrast is the absence of such language in the *Brown* merits opinion itself.

When the Court realized in the mid-1960s that desegregation with "all deliberate speed" meant racial separation "indefinitely" in the South, the justices decided to supplant *Brown II*'s anemic colorblind attack on *de jure* segregation with a forceful frontal assault on enduring racial separation in formerly *de jure* segregated school districts. It was at this point that the Court revised and expanded the *Brown*-era meaning of "segregation" to refer to any racial separation that might be linked to state action.[447] The Court consequently began finding that various colorblind remedies were insufficient for achieving integration. In *Green v. County School Board*, the Court, hewing

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[445] *Brown v. Board of Education II*, 349 U.S. 294 (1955), at 294.

[446] Ibid.

[447] The Court never promulgated a standard by which the effects of fortuitous segregation, as in, e.g., housing, could be extricated from those of *de jure* racial segregation in schools. See Wolf (1981) for an analysis of the misrepresentation of social science and the failure of judicial process in the trial of *Bradley v. Milliken*, a Detroit desegregation case that was later heard before the Supreme Court as *Milliken v. Bradley*, 418 U.S. 717 (1974).

to its informal tradition of unanimity in school desegregation cases begun in 1954, announced that the time for "all deliberate speed" was up. "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*,"[448] Justice Brennan wrote for the majority. The Court also drew an equivalence between the segregation *Brown* condemned and the racial separation that existed in New Kent County schools.

> The pattern of separate 'white' and 'Negro' schools in the New Kent County school system [which had implemented a "freedom of choice" pupil placement system] established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws.[449]

To so claim was a stretch——but *Brown* blessed such judicial flexibility in the interest of advancing salutary constitutional ends under the aegis of equal protection. In privileging the pursuit of justice to the demands of candor and judicial reasoning, *Brown* signaled that decisions such as *Green* would be coming, when and as political and social circumstances permitted. Such decisions would be and are eminently justified by *Brown* as a model for judicial decision-making and as a constitutional precedent.

Three years later, in *Swann v. Charlotte-Mecklenburg Board of Education*,[450] the Court announced that the country's political and social circumstances were now ripe to permit district-wide busing to achieve racial balance as a remedy in *de jure* segregated southern school districts. Two years after *Swann*, in *Keyes v. School District No. 1, Denver*,[451] the Court extended integration

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[448] 391 U.S. 430 (1968), at 439.
[449] Id., at 435.
[450] 402 U.S. 1 (1971).
[451] 413 U.S. 189 (1973), at 201.

by busing to school districts that had never been compelled or authorized by state law to segregate on the basis of race. "This is not a case," Justice Brennan wrote (again for the majority), "where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, *it is only common sense* to conclude that there exists a predicate for a finding of the existence of a dual school system."[452] Though Brennan's common sense was not as widely shared as his words suggested, the Court aggressively authorized and prosecuted a nationwide plan of racial integration by judicial decree.

The most recent revealing debate over *Brown*'s meaning occurred between Chief Justice John Roberts and Justice Stephen Breyer in the Seattle, Washington and Louisville, Kentucky busing cases subsumed under *Parents Involved v. Seattle School District No. 1*.[453] Writing for a four-justice plurality (joined in various places by Justice Anthony Kennedy to make a decision for the Court), Roberts contended that a school district's voluntary busing of students in order to achieve racial integration in the district's schools was unconstitutional because it failed "strict scrutiny"——the most stringent of the "scrutiny rules" to which Balkin's model refers——by not being "narrowly tailored," one of strict scrutiny's requirements. To show that the Constitution is colorblind, Roberts returned to the fount of the modern constitutional regime of equal protection.

> The parties and their amici debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treat-

[452] Id., at 201. (Emphasis mine).
[453] 551 U.S. 701 (2007).

> ment to American children on the basis of their color or race." . . . . As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis*," and what was required was "determining admission to the public schools *on a nonracial basis*" . . . (emphasis added).[454]

As we can see, though Roberts tried to go back to *Brown*, he did not quite make it: the closest he got to the opinion itself was the *Brown II* remedy order and the NAACP's 1952 briefs. There might not have been any ambiguity in Robert Carter's statement to the Court on the first day of the *Brown* oral arguments in December, 1952, but there was more than enough ambiguity in the Court's decision in *Brown* on May 17, 1954, and, in any case, the Court elected not to take any of the constitutional paths the NAACP suggested to it. *Brown II* doesn't clarify *Brown*'s meaning any more than the words of *Brown* itself does. The keys to understanding *Brown* that Roberts lacked are in the theory presented and primary source record collated in this work.

Breyer's response to Roberts is truer to *Brown*'s meaning and purpose. After noting that the tools that the Seattle and Louisville school districts used to foment racial balance in their schools had been pioneered by the federal judiciary to remedy racial imbalance in *de jure* segregated schools in the 60s and 70s, Breyer proclaimed:

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[454] Id., at 747 (internal citations omitted).

> All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education*, long ago promised——efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. . . . In this Court's finest hour, *Brown v. Board of Education* challenged this history [of segregation] and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality––not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.[455]

Brown promised all those things and more. What it promised most was to convert the law of equal protection into a meta-consequentialist authorization for prudential judicial efforts to improve the position of racial minorities in American society. The forces that the justices marshalled in order to decide *Brown* did not abide the traditional judicial requirement of incisive reasoning. But the regime of equal protection inaugurated in *Brown* has provided more than adequate justification for the judicial means to which the justices felt themselves compelled to resort in the founding. They believed, and were correct in their "belief [,] that progress, called history, would validate their course, and that another generation, remembering its own future, would imagine them favorably. Such a faith need not conflict with, but [] overrides standards of analytical reason and scientific inquiry as warrantors of the validity of judgment."[456]

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[455] Id., at 803, 868-9 (internal citations omitted).
[456] Bickel (1970, 13-14).

Appendix

Jackson *Brown* Memo – First Draft[457]

1/6/54

Since the close of the Civil War the United States has been "hesitating between two worlds – one dead – the other powerless to be born". War and military measures brought an old order to an end but as usual proved unequal to founding a new one. The reunited country neither in North in South has been willing really to adapt its practices to its professions on the subject of negro equality.

I must admit to little personal experience or firsthand knowledge by which to test many of the arguments advanced in these cases. One reared in the North and attending public schools where not even a thought was given to segregating the very few negro pupils, finds it difficult to understand the emotional and traditional background of the present problem. Racial tensions which manifest themselves in various forms of legal segregation seem most intense where the ratio of colored to white passes a point where the latter vaguely feel themselves, for some reason, insecure.

It seems instinctive with every race, faith, state or culture to resort to some isolating device to protect and perpetuate those qualities which it particularly values in itself. Separatism, either by voluntary withdrawal or imposed segregation, has been practiced in some degree by many religions, nationalities, [2] and races and by many – one can almost say all – governments to alleviate tensions, prevent subversions, and to quell or forestall violence. No decision by this Court can eradicate these fears, prides and prejudiced on which segregation rests. Even in the North these are latent and while they may not manifest themselves in legal discriminations, they have been made manifest by outbreaks of violence rather more extensive than have occurred in the South.

But in the South the negro not only suffers from racial suspicions and antagonisms present in other states and in other countries of the world, but also, I am convinced, has suffered great prejudice from the aftermath of the great American white conflict. The negro and his champions may justly resent the forces by which he has been held in subjection. But the white South retains in historical memory a deep resentment of the forces which, by conquest, imposed a fierce program of reconstruction and the deep humiliation of carpetbag government. The negro is the visible and reachable beneficiary and symbol of this unhappy experience. Thus, in the southern states he has not only to bear his own disadvantages but the burden engendered by white wars and the hostilities of white politics.

Even so, tested by the pace of history, the rise of the negro in the South, as well as the North, is one of the swiftest and [3] most dramatic advances in the annals of man. Economic and social forces seem to mark discrimination for extinction even faster than legal measures. It is easy, however, to sympathize with the impatience of those who smart under the remaining discriminatory practices. But whether a sentiment and a practice that seems on its way out will be accelerated or retarded by what many are likely to regard as a ruthless use of judicial power is a question that I cannot and need not answer.

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[457] All memos are drawn from the Robert H. Jackson Papers, Box 184, Folder 8, Library of Congress. Bracketed numbers indicate original pagination.

The conclusion that negro segregation in schools has outlived whatever justification it ever had and is incompatible with our current conception of equality before the law, is congenial to my own background and views of fair and wise public policy. While I candidly have great difficulty in finding that segregation is contrary to any law the presently exists, I have no doubt that it is contrary to the law as it will be within a generation. As mortality and replacement operate on this Bench, it seems not only futile but duplicitous to longer lead the southern states to believe that they may prudently spend their revenues or plan their affairs in reliance upon the continual approval by this Court of segregation. But since it bears importantly upon the form and expedition of the relief, this Court must face the difficulties in the way of honestly saying that the states which have segregated schools have not, until [4] today, been justified in regarding their practice as lawful.

II. Basis in Existing Law for Decision.

The Thoughtful layman, as well as the trained lawyer, must wonder how it is that this morning the Constitution suddenly has come to forbid a widespread custom which for three-quarters of a century it has notoriously tolerated. We cannot over simplify this case to be a mere decision as to whether segregation in school is, in our opinion, wise or unwise, good or evil. Questions of method in Constitutional interpretation and of power in our federal system are perhaps as far reaching as any that have been before this Court since its foundation. They must be faced and not avoided or ignored if we are to make a responsible exercise of our power.

Our authority to promulgate this decision in the State cases is the due process and equal protection clauses of the Fourteenth Amendment adopted in 1868, while the District of Columbia case can invoke only the due process clause of the Fifth Amendment adopted in 1791. The text of neither of these days anything specifically about education or about segregation. But they are majestic and sweeping generalities which, standing apart from the history of their times, can well indicate a full and unqualified and co-mingled racial partnership. Yet, if these texts has such meaning how could it be that for more than a half century from the adoption of the Fifth [5] Amendment to the Emancipation Proclamation, it was never suggested that the Due Process Clause even prohibited negro slavery. And how can it be explained that when these words were copied into the Fourteenth Amendment and the Equal Protection Clause was added to them, that Amendment still stopped far short of anything like equal rights for it did not assure even the equal right of the franchise to the negro, but goes on to provide a reduction of Congressional representation for states which deny the negro's right to vote. Nearly two years later (1870) it was found necessary to add the Fifteenth Amendment to prohibit the states from denying the right to vote on account of color. But even when enlarging the assurance of equal rights to include the franchise, nothing was said of education or of the right to co-mingle with white pupils in the public educational system.

Today it is well agreed, as Judge Cardozo reminded us, that these Constitutional generalities "have a content and a significance that vary from age to age". This brings us, however, squarely to the question whether we shall interpret these generalities as they were understood by the age that framed and adopted them or by the age that now reads them. It is implied in the questions which we asked and on which all of the litigants have bestowed extensive research that the original public will that struggled for expression in these [6] Constitutional phrases is at least relevant to our decision.

All that I can fairly get from the legislative debates in searching for the original will and purpose expressed in the Amendment, is that it was a passionate, confused, and deplorable era.

As often is characteristic of legislative history, the sponsors played down the consequences of the legislation they were proposing in order to ease its passage, while the opponents exaggerate the consequences in order to frighten away support. I find in the debates no sound foundation for a conclusion. It is, of course, easy to show that there were those among the sponsors of the movement who hoped for complete social equality and consequent early assimilation of the liberated negro into an amalgamated race. It is equally easy to point to those who thought they took no step in that direction beyond conferring upon the freed man very limited civil rights. The most of the leaders and spokesmen for the movement that put the Civil War Amendment through appear never to have reached a point in their thinking where either negro education or negro segregation was a serious or foreseeable problem, let alone reaching any conclusion as to a solution. The legislative debates, as I read them, result in either a blank or a match.

But if deeds, rather than words, count as evidence of understanding, there is little indeed to show that these Amendments [7] condemn the practice here in question. How otherwise shall we explain such facts as these: The Congress that proposed the Fourteenth Amendment and all Congresses since have established and maintained segregated schools in the District of Columbia. This system was so open and notorious that it must have been known to every Congressman who voted for District of Columbia Appropriations down to this very day. Sporadic protests were made but disregarded. Congress has legislated concerning some negro civil rights, such as the right to sit upon juries, but has never touched the segregation question, either in the States or in the Federal City. It readmitted representatives of the Confederate reconstructed states to the Union, requiring them to accept the Fourteenth Amendment, but not requiring any provision on this subject. When we turn to the deeds of the States, we find them equally difficult to reconcile with a purpose to end segregation in schools. Nine states did not have segregated schools when the Amendment was submitted to them. Five did have but abandoned them about the time of the Amendment. Four had segregated schools but did not ratify the Amendment. Two border states ratified and continued segregated schools. Nine Northern states, either established or continued segregated schools after ratifying the Amendment. The eight reconstructed states all established segregated schools. At this time seventeen states of the Union are maintaining [8] separation of the races in the public schools. Many of these were Northern states governed by the same currents of political opinion and by the same political party that had fought the war, freed the slaves and put through the Amendments. It is hard to charge their continuance of the practice of segregation to mere perversity, prejudice or disregard for law. Plainly, there was no consensus among legislators and administrators or the public of the several states that segregation was forbidden by the ratification of the Fourteenth Amendment.

A long line of judicial precedents not only constitutes a usually respected source of law, but judicial decision made close to the time of the Amendment by judges who participated in the movement to enact it are not only entitled to respect as to opinions but as reflection of first hand knowledge of history. But neither in the state courts of the Northern States nor in this Court where Northern men predominated has there been any clear pronouncement or line of decision that these clauses admittedly requiring equal opportunity for education prohibit a policy that each race should enjoy its rights apart rather than in co-partnership. The layman must wonder how it comes that the best informed judges who had risked their lives for these Amendments did not understand their meaning, while we at this remote time do understand them.

[9] Custom too, is a powerful lawmaker. Indeed not long ago we decided that custom has nullified the Constitutional plan for independent Presidential electors. I doubt, as I then indicated, that any custom could be allowed to override express provisions of the Constitution. But here we have the custom of segregation, which is not expressly forbidden and which has prevailed in both Southern and many Northern states. It must be recognized that in the many judicial decisions which have sanctioned the custom of segregation the judges were following the ancient and well established process of regarding the long established usage of a people as the strongest kind of evidence of its law. But what we decide today is that a custom deeply anchored in our social system is contrary to law.

III. Sociological and Political Considerations

Various intangible and extra-legal criteria and sociological, psychological and even political considerations are urged to persuade us that whatever was meant or purposed originally we should now decree segregation to end as an obsolete, unjust, and impolitic practice. It is said to be offensive to the best contemporary opinion here and damaging to our prestige abroad. It is said that segregation is based on a philosophy of inherent inequality of races and that it creates in the young negro children an inferiority complex [10] which has a retarding effect on their education progress.

All of these are arguments of policy with which, in the main as policy, I do not disagree. But if the Constitution forbids any classification for any purpose on the basis of color or race, these arguments are unnecessary and if it permits any classification on such a basis, then the occasion and justification for the classification would seem to present legislative problems for the States, not judicial questions.

I do not think we can import into the concept of equal protection of the law psychological and subjective factors. I have no doubt that segregation has psychological consequences, but I know too that the woes of the colored child are by no means solved merely by forcing him into white company. And if we should regard the feelings and reactions of those who are coerced into segregation I suppose we should also weigh the effect of those who are coerced out of it. While the prosegregation emotion may seem to us less rational than antisegregation emotion, we can hardly deny the existence of sincerity and passion of those who think that their blood, birth and lineage are something worthy of protection by separatism. Such factors are not mensurable by the judicial process. Many classifications that are useful in governing may be disliked and have adverse effects on those classified – minority – [11] are denied privileges that come with the mystic age of twenty-one, married persons are classified differently than single ones, sometimes to their advantage, sometimes not, veterans, even by compulsion, have a separate category in civil service. Not long ago this Court held that the Due Process Clause does not prevent the federal government from making a racial classification of citizens when it sanctioned the removal of the Japanese descended population from the West Coast during the war. While I did not agree with that basis of classification as compatible with the concept of Due Process, I do not think we should read into the concept of equal protection the shadowy and changing doctrines relating to mental and emotional reactions.

No informed person can be insensitive to the fact that the past few years have witnessed a profound change in the responsible and rational public opinion toward segregation and all related problems. The awful consequences of racial prejudice revealed by the post mortem upon the

Nazi Regime in Europe have caused a revulsion against the kind of racial feeling that was manifest in the Korematsu case. But what part public opinion should consciously play in judicial decisions is another matter.

A judicial determination as to what the law is may be supposed to represent learning, judgment and reason, rather than mere choice from will or inclination. If we, who have pondered [12] this problem, as we have pondered no other in my experience on the Court, and have read the briefs of learned counsel for all parties and the lengthy research which rescues much obscured history from oblivion and have heard the arguments of the parties, consciously defer in our deliberations to those who have done none of these things, it means that the judicial process has counted for naught. If the matter were one of policy, of course, the will of constituents should govern, but judges should have no constituents. And the Amendment, if construed in the light of public opinion, would mean that it was being construed by those who have not had the advantage of studying an argument instead of by those who had.

The Fourteenth Amendment does not contemplate a static and perpetual condition, but makes provision for recognizing and giving effect to changing conditions and currents of opinion in application of its principles to an expanding and developing society. Whatever doubt and confusion may exist as to the meaning of other phrases of the Fourteenth Amendment, one thing is perfectly clear. It provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." Thus, the Amendment does not attempt to speak the last word on the subjects with which it deals in such generalities, but anticipates that from time to time there will be necessity for supplemental and [13] interpretative action. If Congress were to find segregation an obstacle to achieving the purposes of the Amendment and that legislation to abolish it was therefore necessary and proper, I do not suppose any Justice would doubt the Constitutionality of such an act. Certainly if the Amendment condemns segregation without any implementation, it could not be less effective if it were implemented by a statute. So we have to assume that a complete and undoubted power to deal with this subject exists in a branch of the government co-ordinate with our own and one which is chosen by political methods and responsive to political .

Apparently the country suffers a schizophrenic division – it elects Presidents who oppose segregation and a Congress that favors or tolerates it. We have to assume that Congress is not opposed to segregation and does not consider it an obstacle to the achievement of the purposes of the Fourteenth Amendment. We are not at liberty to assume that Congress disregards its duty. If Congress has not expressly approved segregation, it has at least repeatedly tacitly supported it in the Nation's Capital and has made no effort to outlaw it either in the federal territory or in the States. It is said, however, that the South has enough representation to prevent such a step. But that is to say that the Court should intervene to promulgate as a law that which our Constitutional representative system will not enact. It means nothing less than [14] that either Congressional representation does not represent sentiment or public sentiment does not resent segregation. It means nothing less than that we must act because our representative system has failed.

Jackson *Brown* Memo – Second Draft

2/15/54

I.

Since the close of the Civil War the United States has been "hesitating between two worlds – one dead – the other powerless to be born". War brought an old order to an end but as usual force proved unequal to founding a new one. Neither North nor South has been willing really to adapt its racial practices to its professions. The race problem would be quickly solved if some way could be found to make us all live up to our hypocrisies.

It seems instinctive with every race, faith, state or culture to resort to some isolating device to protect and perpetuate those qualities, real or fancied, which it particularly values in itself. Separatism, either by voluntary withdrawal or by imposed segregation, has been practiced in some degree by many religions, nationalities, and races and by many – one almost can say all – governments to alleviate tensions, prevent subversions, and to quell or forestall violence. This Court can not eradicate these fears, prides and prejudices on which segregation rests. Even in the North these are latent and while they may not manifest themselves in legal discriminations, they do by outbreaks of racial rioting.

[2] Racial tensions seem to develop wherever the ratio of colored population to white passes a point where the latter vaguely feel themselves, for some reason, insecure. But in the South the Negro not only suffers from racial suspicions and antagonisms present in other states and in other countries, but also, I am convinced, has suffered great prejudice from the aftermath of the great American white conflict. The white South retains in historical memory a deep resentment of the forces which, after conquest, imposed a fierce program of reconstruction and the deep humiliation of carpetbag government. The Negro is the visible and reachable beneficiary and symbol of this unhappy experience, on whom many visit their natural desire for retaliation.

I must admit to little personal experience to teach the insight necessary to test many of the arguments advanced in these cases. One taught in the public schools in a part of the North, where not even a thought was given to segregating the very few Negro pupils, finds it difficult to understand the emotional and traditional background which complicate the present problem.

Tested by the pace of history, the rise of the Negro in the South, as well as the North, is one of the swiftest and [3] most dramatic advances in the annals of man. Economic and social forced seem to mark discrimination for extinction even faster than legal measures. It is easy, however, to understand that historical process may do the contemporary individual no good for his life moves faster than society. But whether a real abolition of segregation will be accelerated or retarded by what many are likely to regard as a ruthless use of federal judicial power is a question that I cannot and need not answer.

That Negro segregation in the schools has outlived whatever original justification it may have had and is no longer wise or fair public policy is a conclusion congenial to my background and social and political views. Economic, social and political considerations seem to mark it for certain and early, if gradual extinction. Whatever we may say the law is today, I have no doubt that within a generation segregation will be outlawed. As the twin forces of mortality and replacement operate on this bench that seems inevitable unless some dramatic and unforeseeable excess by the Negro and his friends shall cause reversal of present trends.

But we can not oversimplify this decision to be a mere expression of our personal opinion that school segregation is unwise or evil. We have not been chosen as legislators but as [4] judges. Questions of method and standards of constitutional interpretation and of limitation on

responsible use of judicial power in our federal system are as far reaching as any that have been before the Court since its establishment. This Court must face the difficulties in the way of honestly saying that the states which have segregated schools have not, until today, been justified in regarding their practice as lawful. And the thoughtful layman, as well as the trained lawyer, must wonder how it is that a supposedly stable organic law of our nation this morning forbids what for three quarters of a century it has allowed. I think we individual justices may not, in justice to this Court as an institution and to our profession, brush off these problems.

II. Basis in Existing Law for Decision

Any authority of the judiciary to promulgate this decision has existed in the State cases has existed since 1868 and in the case of the District of Columbia since 1791. The due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment are the respective texts for interpretation. Neither of these says anything about education or about segregation. But they are majestic and sweeping generalities which, standing alone can be read to require a full and [5] equal racial partnership. Yet, if these texts had such meaning to the age that wrote them, how could it be that for more than a half century from the adoption of the Fifth Amendment to the Emancipation Proclamation, it was never suggested that the Due Process Clause of the Fifth Amendment even prohibited negro slavery in the District of Columbia? And how can it be explained that when these words were copied into the Fourteenth Amendment plus its Equal Protection Clause did not assure even the equal right of franchise to the Negro, but goes on to provide a reduction of Congressional representation for states which deny the Negro's right to vote. Nearly two years later (1870) it was found necessary to add the Fifteenth Amendment to assure him the vote but even then nothing was provided as to the right to education or to co-mingle with white pupils in the public educational system.

There is controversy as old as the Republic as to whether the courts apply constitutional generalities in the sense that they were understood by the age that framed them or by the later age that reads them. It is implied in our questions on which all of the litigants have bestowed extensive research that the original public will that struggled for expression in these Constitutional phrases is at least relevant to our decision.

[6] In searching for the original will and purpose expressed in the Fourteenth Amendment, all that I can fairly get from the legislative debates is that it was a passionate, confused, and deplorable era. As often is characteristic of legislative history, its sponsors played down the consequences of their proposal to order to ease it passage, while its opponents exaggerated the consequences to frighten away support. It appears that among the sponsors of the movement were a few who hoped to bring about complete social equality and consequent early assimilation of the liberated Negro into an amalgamated race. But on every test of strength those of more moderate views prevailed. No support for that view for example can be cited from the great Emancipator himself. The majority stopped at conferring upon the freed man very limited civil rights. Most of leaders and spokesmen for the movement that carried the Civil War Amendments appear never to have reached a point in their thinking where they foresaw either Negro education or Negro segregation as serious foreseeable problems, let alone any conclusion as to their solution.

If deeds, rather than words, count as evidence, there is little indeed to show that these Amendemnts were understood in their own time to condemn the practice here in question. The [7] Congress that proposed the Fourteenth Amendment and all Congresses to this day have established and maintained segregated schools in the District of Columbia. This system was so open

and notorious that it must have been known to every Congressman who voted for District of Columbia Appropriations down to this very day. Only a few sporadic protests were made but they were disregarded. Congress has legislated concerning some Negro civil rights, such as the right to sit upon juries, but has never touched the segregation question. It readmitted to the Union representatives of the "reconstructed" Confederate States, requiring them to accept the Fourteenth Amendment, but heedless of the omission of any provision on this subject.

When we look to the behavior of the States, we find them equally difficult to reconcile with an understanding that the Amendment prohibited segregation in schools. Nine states did not have segregated schools when the Amendment was submitted to them. Five had segregation but abandoned it about the time of the Amendment. Four which had segregated schools did not ratify the Amendment. This might plausibly score nine states on the side of abolition. But on the other side nine Northern states either established or continued segregated schools after ratifying the Amendment and two border states also ratified and continued segregated schools. The [8] eight reconstructed states all established segregated schools. At this time seventeen states of the Union are maintaining separation of the races in the public schools. Northern states have been largely governed by the same political party and by the same currents of political opinion that had fought the war, freed the slaves and put through the Amendments. Plainly, there was no concensus among legislators or educators of the several states that segregation was forbidden by the Fourteenth Amendment.

A long line of judicial decisions beginning close to the time of the Amendment made by Northern judges who participated in the movement to enact it are not only entitled to respect for their legal scholarship but also as a reflection of their first hand knowledge of history and the conditions of those times. Neither in the state courts of the North nor in this Court where Northern men predominated has understanding prevailed that these clauses prohibit the states from deciding that each race should enjoy its rights apart rather than in co-partnership. Almost a century of decisional law rendered by informed judges, many of whom had risked their lives for the cause the produced these Amendments, is almost unanimous in the view that the matter was one left to solution by each state – at least in the absence of Congressional action.

[9] This practice of legislators and educators and opinions of the Courts has been reinformed by custom, a powerful lawmaker. Indeed not long ago we decided that custom had nullified the Constitutional plan for independent Presidential electors. But here the custom of segregation is not contrary to any express provision, has prevailed in all Southern and many Northern states, and has been recognized in many judicial decisions. This Court, in common with courts everywhere, has recognized the force of long custom and has been reluctant to use judicial power to try to recast social usages. But we decide today that the unwritten law has long been contrary to a custom deeply anchored in our social system. Thus despite my personal satisfaction with the Court's judgment, I simply can not find, in surveying all of the usual sources of law, anything which warrants me in saying that it is required by the original purpose and intent of the Fourteenth or Fifth Amendment.

III.

Today's decision can not, with intellectual honesty, be grounded in anything other than the doctrine, of which Judge Cardozo reminded us, that these Constitutional generalities "have a content and a significance that vary from age to age." Certainly no one familiar with his teachings would think this meant, what some people [10] advocate, that we declare new constitutional law with the freedom of a constitutional convention sitting continuously and with no necessity

for submitting its innovations for approval of Congress, ratification by the states or approval of the people.

Of course the Constitution must be a living instrument and can not be read as if written in a dead language. It is neither novel nor radical doctrine that statutes once constitutional may become invalid by changing conditions and those good in one state of facts may be bad under another. Among the multitude of cases to this effect are Nashville C. & St. Louis Railway v. Walters, 294 U.S. 405 at 414 (1935); Abie State Bank v. Bryan, 282 US. 765, 772 (1931); citing Smith v. Illinois Bell Telephone Company, 282 U.S. 133, 162; Allen v. St. Louis Iron Mountain and Southern Railway Co., 230 U.S. 553, 555, 556; Lincoln Gas and Electric Co. v. City of Lincoln, 250 U.S. 256, 268; Chastieton Corporation v. Sinclair, 264 U.S. 543, 547; Perrin v. United States, 232 U.S. 478, 487; Kansas City Railway v. Anderson, 233 U.S. 325, 329; Poindexter v. Greenhow, 114 U.S. 270, 295; Missouri Pacific Railroad Co. v. Norwood, 283 U.S. 249; Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 289; Withnell v. Ruecking Construction Co., 249 U.S. 63 at 71; Chicago, Terre Haute & Southwestern Railway v. Anderson, 242 U.S. 283.

[11] But a good many considerations are urged upon us to decree an end to segregation regardless of what the Amendments originally meant or purposed which I do not think appropriate for judicial appraisal or acceptance. Extra-legal criteria from sociological, psychological and political sciences are proposed. Segregation is said to be offensive to the best contemporary opinion here and damaging to our prestige abroad. It is said to be based on a philosophy of inherent inequality of races, and that it creates in young Negro children an inferiority complex which retards their education and embitters their attitudes to life. These are disputed contentions which I have little competence to judge as scientific matters but with which, for purposes of the case, I shall not disagree. I have no doubt that segregation has psychological consequences, but as I recall school life without segregation, the Negro still was greatly disadvantaged and must have felt its sting.

However that may be, and if all the woes of colored children would be solved by forcing them into white company, I do not think we should import into the concept of equal protection of the law these elusive psychological and subjective factors. They are not determinable with satisfactory objectivity or mensurable with reasonable certainty. If we adhere to objective criteria the [12] judicial process will still be capricious enough.

Such criteria as hardship on those classified have been heretofore rejected by this Court. Not long ago it held that the Constitution does not prevent a classification of citizens by racial descent for seizure and transportation of the Nisi away from their West Coast homes during the war. Korematsu v. United States. U.S. . Of course if the Court had taken counsel of the feelings or interests of the victims, or simple justice to them it could not have decided as it did. Also in this case if we should regard the feelings and reactions of those who are coerced into segregation, I suppose we should also weigh the effect of those who are coerced out of it. While the prosegregation emotion may seem to us less rational than antisegregation emotion, we can hardly deny the existence of sincerity and passion of those who think that their blood, birth and lineage are something worthy of protection by separatism.

No informed person can be insensitive to the fact that the past few years have witnessed a profound change in the responsible and rational public opinion toward segregation and all related problems. The awful consequences of racial prejudice revealed by the post mortem on the Nazi Regime in Europe have caused a revulsion against the kind of racial feeling that produced the [13] Korematsu case. But what part public opinion should consciously play in judicial decisions

is another matter. If the matter be one of policy then, of course, the will of constituents should govern. But judges have no constituents and the representative branch of our government is the Congress. We have pondered this problem, as we have pondered no other in my experience on the Court, and have read the briefs of learned counsel for all parties and the lengthy research which rescues much obscure history from oblivion and have heard the arguments of the parties. If we consciously defer in our deliberation to those who have done none of these things, it means that the judicial process has counted for naught, and the judgment is made by those who have not heard the arguments instead of by those who have.

The real question as I see it is whether the Constitution permits any classification or separation of Negro and White merely on the basis of color or racial ascent. If not these policy arguments are superfluous and, if so, they are for consideration of the legislatures not the courts.

I think the change which warrants our decision is not a change in the Constitution but in the Negro population. Certainly in the 1860's and throughout the nineteenth century the Negro population, as a whole, was a different people than today. Lately [14] freed from bondage, they had no opportunity as yet to show their capacity for education or assimilation, or even a chance to demonstrate that they could be self-supporting or in our public life anything more than a pawn for white exploiters. I can not say that it was an unreasonable assumption that negro educational problems were elementary, special and peculiar and their mass teaching an experiment not easily tied in with the education of pupils of more favored background. Nor, when we view the progress that has been made under it, can we honestly say that the practice of each race pursuing its education apart was wholly to the Negro's disadvantage. His progress under these conditions has been spectacular.

Whatever may have been true at an earlier period, the mere fact that one is in some degree colored no longer created a presumption that he is inferior, illiterate, retarded or indigent. Moreover, assimilation is under way to a marked extent. Blush or shudder, as many will, mixture of blood has been making inroads of segregation faster than the courtroom. A line of separation between the races has become unclear and blurred and an increasing part of what is called colored population has as much claim to white as to colored blood. This development baffles any just segregation effort.

[15] Also relevant changes have occurred in the status of the public school. Education, even for the whites, was once regarded as a privilege bestowed on those fortunate enough to be able to take advantage of it and often was not compulsory. The concept today has changed. Education is not a privilege but a right and more than that a duty, to be performed not merely for one's own advantage but for the security and stability of the nation. Access to educational facilities has been gradually transformed from a matter of grace into a right which may not be encumbered with unconstitutionally discriminatory or oppressive conditions. And while education was long regarded as at most a local or state concern, far from the reach of federal authority, the federal judicial power especially, and the appropriative power of Congress has moved in to the local problems and made education a national concern.

The Negro is not free of local educational control. He must meet the prescribed standards of learning, discipline and health. He may be treated on his individual merit as a pupil, attend schools set apart for those of his neighborhood. But he may not be included or excluded merely because he has Negro blood wholly or in part.

Jackson *Brown* Memo – Third Draft

3/1/54

Memorandum by Mr. Justice Jackson

I.

Since the close of the Civil War, the United States has been "hesitating between two worlds – one dead – the other powerless to be born". Even the North has never fully conformed its racial practices to its professions.

As one whose formative years were spent in the public schools in a part of the North where Negro pupils were very few and not even a thought was given to segregating them, I suppose I am predisposed to the conclusion that Negro segregation in the schools in most parts of the country at least has outlived whatever justification it may have had. Economic, social and political considerations, which prevented it from gaining a foothold in some parts of the North, seem to mark it for certain and early extinction elsewhere. That within a generation it will also be outlawed by Constitutional interpretation, whatever we may say today, also appears certain. As the forces of mortality and replacement operate on this bench, it seems certain that the political forces represented by the Executive branch rather than the inertia represented by the Congressional branch of the government will eventually make itself felt in law.

[2] These would be simple cases if they could be decided by a mere expression of our personal opinion that school segregation is morally, economically intellectually or even legally indefensible. It is deeply imbedded in social custom in a large part of this country and its eradication by legal process involves nothing less than a reconstruction of society. It persists because it rests on fears, prides and prejudices which this Court cannot eradicate and which, even in the North, are latent and tends to develop tensions wherever the ratio of colored population to white passes a point where the latter vaguely feel themselves for some reason insecure.

It has seemed almost instinctive with every race, faith, state or culture to resort to some isolating device to protect and perpetuate those qualities, real or fancied, which it especially values in itself. Separatism, either by voluntary withdrawal or by imposed segregation, has been practiced in some degree by many religions, nationalities and races and by many – one almost can say all – governments to alleviate tensions, prevent subversions and to quell or forestall violence. Even this Court has but recently declared it to be consistent with the Constitution for the Federal Government to classify citizens for removal and internment according to their racial ancestry and to leave the [3] judgment as to the necessity and reasonableness of treatment based on the classifications to the other branches of government. Korematsu v. United States, 323 U.S. 214.

It seems clear to me that in the South the Negro not only suffers from the antagonisms present in other states and countries, but also from the aftermath of the great American white conflict. The White South retains in historical memory a deep resentment of the forces which, after conquest, imposed a fierce program of reconstruction and the deep humiliation of carpetbag government. Whatever the motivation of the reconstruction measures, the Negro was made their visible symbol and reachable beneficiary by the North, with the natural consequence that the desire for retaliation was directed against him because of his association.

If we should regard the feelings and reactions of those who are coerced into segregation, I suppose we should also weigh the psychological effect on those who are coerced out of it. While the pro-segregation emotion may seem to us less rational than anti-segregation emotion, we can

hardly deny the sincerity and passion of those who think that their blood, birth and lineage are something worthy of protection by separatism.

Whether a use of judicial power, which many will regard [4] as unjustifiable, will diminish or increase the stresses and strains of racial relations, I cannot and need not answer. I must admit to little personal experience to test many of the considerations involved in that matter. However, I am confident that if the use of judicial power were also needlessly ruthless and inconsiderate of the conditions which have brought about and continued this custom it may defeat the purposes of the decision.

Because these considerations bear importantly upon the scope and form of remedy to be allowed in these cases, I think the Court must face the questions of method and standards of constitutional interpretation and of the limitations on responsible use of judicial power in a federal system which are implicit in these cases and are as far reaching as any that have been before the Court since its establishment.

II. EXISTING LAW DOES NOT CONDEMN SEGREGATION

The thoughtful layman, as well as the trained lawyer, must wonder how it is that the organic law of our nation this morning forbids what for three-quarters of a century it has tolerated or approved. He must further wonder how it is that this conclusion is reached by the branch of the government that is supposed only to declare existing laws and which has exactly the same legislative and constitutional materials that have been before the Court for [5] many years. Can we honestly say that the States which have maintained segregated schools have not, until today, been justified in regarding their practice as constitutional?

Of course it is true that all the time there has been visible the warning sign of the due process and particularly the equal protection clause of the Fourteenth Amendment. These majestic and sweeping generalities standing alone can be read to require a full and equal racial partnership in all matters within the reach of the law. They can be read to virtually replace our federation with a unitary form of government. But neither of these clauses specifically mentions education or segregation. Any authority that they give to the judiciary to outlaw segregation has existed as to the State cases since 1868 and in the case of the District of Columbia since 1791. Yet, if these texts had such meaning to the age that wrote them, how could it be that the Fifth Amendment for half a century tolerated slavery in the District of Columbia. And how can it be that when those words were copied into the Fourteenth Amendment and an equal protection clause added, that was not deemed to assure the Negro the right to vote for the Amendment goes on to provide a reduction of Congressional representation for states which do not allow him to exercise the franchise. Nearly two years later (1870) it was [6] found necessary to add the Fifteenth Amendment to assure him the vote, but even then, with the shortcomings of the Fourteenth Amendment obvious, nothing was provided either as to segregation or as to education.

I suppose that the original will and purpose expressed in a constitutional document is at least relevant to its subsequent interpretation. So much is implied by the questions that we have asked of counsel. In searching for the original will and purpose expressed in the Fourteenth Amendment, all that I can fairly get from the legislative debates is that it was a passionate, confused and deplorable era. Like most legislative history it has the misleading characteristic that its sponsors played down the consequence of their proposal in order to ease opposition to its passage, while its opponents exaggerated the consequences to frighten away support. Among the sponsors of the movement were a few who doubtless hoped that it would bring about complete social equality and early assimilation of the liberated Negro to an amalgamated race. But on

every test of strength those of more moderate views prevailed. For example, no support for the abolition of segregation can be cited from the great Emancipator himself. The majority stopped with conferring upon the freed man certain very limited civil rights. [7] Most of the leaders and spokesmen for the movement that carried the Civil War Amendments appear never to have reached a point in their thinking where they considered either the segregation or the education of the Negro to present pressing problems, let alone reaching any conclusion as to their solution.

If deeds rather than words evidence purpose, there is little to show that these Amendments were understood or intended in their own time to condemn the practice here in question. The very Congress that proposed the Fourteenth Amendment and all Congresses from that day to this have established or supported and maintained segregated schools in the District of Columbia. This system was notorious and must have been known to every Congressman who voted for District of Columbia appropriations down to this very day. Occasionally a protest was made but they were always disregarded. Congress has legislated concerning some Negro civil rights, such as the right to sit upon juries but never has touched the segregation question. Congress re-admitted to the Union representatives of the "reconstructed" Confederate States, requiring them to accept the Fourteenth Amendment but not requiring any provision on this subject.

Turning from Congress to look to the behavior of the States, we find that equally difficult to reconcile with any [8] understanding that the Amendment would prohibit segregation in schools. Nine states did not have segregated schools when the Amendment was submitted to them. Five did, but abandoned at about that time. Four, which had segregated schools, did not ratify the Amendment. Nine Northern States and two border States either established or continued segregated schools after ratifying the Amendment. The eight reconstructed states all established segregated schools. Down to the present day, seventeen states of the Union are maintaining legal separation of the races in the public schools. It is easy as to the Southern States to smugly assume that segregation has been a projection of pro-slavery and secession sentiment, but that does not account for it in the larger number of Northern States where the same political party that sponsored the Amendments has a large part of the time in most of them also been predominant in the state administrations. Plainly, there was no consensus among legislators or educators of the several states ratifying the Amendments that it was to forbid segregation.

In the state courts of the North and in this Court where Northern men have predominated no understanding has prevailed that these clauses of their own force prohibit the States from deciding that each race must obtain its education apart [9] rather than in co-partnership. Almost a century of decisional law rendered by judges, many of whom risked their lives for the cause that produced these Amendments, is almost unanimous in the view that the Amendment tolerated segregation by State action – at least in the absence of Congressional action to the contrary.

The fundamental premise of the judicial reasoning which prevailed in the early days is important as the basis of the reasoning which prevails today. It was that the requirement of equal protection does not disable the State from making reasonable classifications of its inhabitants nor impose the obligation to accord identical treatment to all. All that it requires is that the classifications of different groups rest upon real and not upon feigned distinctions, that the distinction have some rational relation to the subject matter for which the classification is adopted, and that the differences in treatment between classes shall not go beyond what is reasonable in the light of the relevant differences. These premises are valid and repeatedly applied today. But the early judges also reasoned, influenced largely by precedents that antedated the Fourteenth Amendment, that there were such differences between the Negro and the White races viewed as a whole

as warranted separate classification and differences that were relevant not only for [10] their educational facilities but also for marriage, for access to public places of recreation, amusement or service and as passengers on common carriers and as the right to buy and own real estate.

The custom of the people has always been recognized as a powerful lawmaker and custom reinforced the practice of legislators and educators and the opinions of the courts as those practices reinforced custom. This Court, in common with courts everywhere, has recognized the force of long custom and has been reluctant to use judicial power to try to recast social usages established among the people. Indeed, not long ago, we decided that custom has nullified the constitutional plan for independent Presidential electors. Today's decision is that the Constitution forbids a custom deeply anchored in our social system.

III. LIMITS OF JUDICIAL ACTION

The justification that I see for judicial action on this subject is the doctrine concerning it which is already on our books. In view of the deference habitually paid by other branches of the government to this Court's interpretation of the Constitution, it is not unlikely that a considerable part of the inertia of Congress and of the country has been due to [11] the belief that the existing system is Constitutional. If it was a mistake to hold that the Fourteenth Amendment was more than an abling act to empower Congress to act on the subject, that mistake was made long ago and we should probably not now retreat from it. If the Court was right to declare that the Amendment was self-executing to the extent of requiring equal if separate facilities, there is the same power and duty to say whether, under present conditions, that doctrine still is valid.

The real question to me is, assuming the same premises upon which earlier courts have reasoned as to the power of the State to make classifications based on real differences and to make reasonable distinctions in treatment based on those classifications, segregation can today be sustained.

Of course the Constitution must be construed as a living instrument and cannot be read as if written in a dead language. It is neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions and those held to be good in one state of facts may be held to be bad in another. A multitude of cases, going back far into judicial history, attest to this doctrine.

It is not in my opinion necessary or true to say that these earlier judges, many of whom were as sensitive to human [12] values as any of us, were wrong in their time. But in recent times the practical result of decisions has been to nullify the classifications for many of the purposes as to which it was originally held valid.

Whatever may have been true at an earlier period, the mere fact that one is colored does not today create a reasonable presumption that he is inferior, retarded, or a special problem in education. Certainly in the 1860's and throughout the nineteenth century the Negro population as a whole was a different people than today. Lately freed from bondage they had no opportunity as yet to show their capacity for education or assimilation or even a chance to demonstrate that they could be self-supporting or anything more in public life than a pawn for white exploiters. There was a strong belief in heredity and the Negro's heritage was close to primitive. Likewise his environment from force of circumstance was not conducive to his mental development. I do not find it necessary to stigmatize as hateful or unintelligent the early assumption that Negro education presented problems that were elementary, special and peculiar and that the mass teaching of Negroes was an experiment not easily tied in with the education of pupils of more favored background. Nor, when I view the progress that was made under it, can I confidently say that the

practice of each race pursuing its education apart has been, up to now, wholly [13] to the Negro's disadvantage. From my little experience in a non-segregated school, it is clear to me that to mingle closely with White pupils does not fully solve the Negro's psychological or educational problem. Indeed, Negro progress, even under segregation, has been spectacular and tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man. It has enabled him to outgrow the system and to overcome the presumptions on which it was based.

The handicap of inheritance and environment has been too generally overcome today to warrant such a classification based on race alone. I do not say that every Negro everywhere is so advanced nor would I know whether the proportion who have shown educational capacity is or is not everywhere similar. But it is sufficiently general to require us to say that the mere possession of colored blood, in whole or in part, no longer affords a reasonable basis for a classification for educational purposes and that each individual must be rated on his own merit. Retarded or subnormal ones, like the same kind of Whites, must be accorded separate educational treatment. All that is required is that they be classified as individuals and not as a race for their learning, aptitude and discipline.

Moreover, we cannot ignore the fact that assimilation [14] today has progressed to a very market extent beyond where it was at the earlier periods. Blush or shudder, as many will, mixture of blood has been making inroads on segregation faster than change in law. No clear line of separation between the races exists, it has become unclear and blurred and more and more a large population with as much claim to white blood as to colored blood baffles any justice in a segregation effort.

Nor can we ignore the fact that the concept of the place of public education has markedly changed. Once a privilege conferred on those fortunate enough to take advantage of it, it is now regarded as a right of a citizen and a duty enforced by compulsory education laws. Any thought of public education as a privilege which may be given or withheld as a matter of grace has long since passed out of American thinking.

For these reasons I am convinced that we should strike from our books the doctrine of separate but equal facilities and must strike down provisions of State constitutions, statutes, or customs which classify persons for separate treatment in matters of education based solely on possession of colored blood.

However, the problem of introducing and enforcing a widespread change in the social customs and habits of the people presents a further problem which this Court must face in view of [15] the limitations upon the nature of the judicial process. To pervert the federal judiciary from its constitutional purposes is too high a price to pay for expediting a movement that is already progressing with great rapidity.

IV. JUDICIARY NO MEDIUM OF SOCIAL TRANSITION.

Our decision today striking down State statutes which authorized or require segregation will not produce a social transition nor is the judiciary the agency to which the people should look for that result. Our decisions may end segregation in Delaware and Kansas where it lingers by a tenuous lease of life. But where the practice really is entrenched it exists independently of any statute or decision as a local usage and deep-seated custom sustained by the prevailing sentiment of the community. Striking down state statutes will not end the local practice of segregation.

The futility of effective reform of our society by judicial decree is demonstrated by the history of this very matter. For many many years this Court has pronounced the doctrine that

while separate facilities are permissible in accordance with the plain words of the Fourteenth Amendment, they must be equal for the races.

Our pronouncement to that effect has remained a dead [15] letter in a large part of the country. A casual traveller in many sections can see that for himself. Why has the separate but equal doctrine declared by this Court so long been a mere promise to the colored ear to be broken to the

It has remained an empty pronouncement because the judicial department has no power to enforce its general declarations of law upon masses of people but only upon those before it in a particular litigation. Our pronouncement today has no concrete force as to any particular school district until some Negro of that districts brings an action to enforce his individual rights. Contempt proceedings as to those who disobey the Court's order may be available but only against those who were parties to the action. This costly, time-consuming litigation of a magnitude impossible for disadvantaged people is the judicial process.

What reason have we to believe that a pronouncement that segregation is unconstitutional will be anymore self-executing or anymore efficiently executed. An individual action must be maintained in every school district which shows persistent recalcitrance. Even then if it is deliberately disobeyed, contempt proceedings in many cases would require a jury trial, before juries drawn from the very community that resists the decree. The fact is that we are initiating a change in the social system [17] of a large part of the United States. With no machinery except that of the courts to put the power of the government behind it seems likely to result in a failure that will bring the Court into contempt and the judicial process into discredit.

The Fourteenth Amendment does not contemplate a static and perpetual condition. It makes provision for recognizing and giving effect to changed conditions and public opinion in a developing society. Its history is convincing that, like most organic acts, it was not a code detail but a transfer of power to the federal government. One thing it clearly provides "the Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." Thus the Amendment does not attempt to speak the last word on the subjects with which it deals in such generalities. It was, above all, an enabling Act which anticipated that from time to time there would be necessity for supplemental measures to make it complete and effective. What it empowered in general, it authorized Congress to complete in detail.

Any constructive policy for abolishing educational segregation must come from Congress. It can delegate its supervisions to some administrative body provided with standards for determining the conditions under which complete abolition should [18] be ordered and the measures by which it should be approached. It can make provisions for federal funds where changes required are beyond the means of the community. We must not forget that the changes will require extensive changes in physical plans and will impose the largest burden on some of the lowest income regions of the Nation. Moreover, Congress can lift the heavy burden of private litigation from disadvantaged people and make the investigation and administrative proceedings against recalcitrant districts the function of some public agency that would secure enforcement of the policy. Its legislation can provide the rule and standard of conduct binding on everyone in the country in contrast with the judicial process which binds only the parties to a particular litigation.

Up to now, Congress was justified in assuming that segregation does not offend the Fourteenth Amendment. It is no longer justified in that assumption. We are urged, however, to supply various means of supervision of the transition of the country from segregated to non-segregated

schools upon the basis that Congress may or will refuse to act. That assumes nothing less than that we must act because our representative system has failed.

Apparently the country suffers a schizophrenic division [19] while it elects executives who oppose segregation it returns a Congress that favors or tolerates it. We must assume from this action in reference to the District of Columbia that Congress is not opposed to segregation and does not consider it an obstacle to the achievement of the purposes of our Constitution. Whether it will continue in that belief remains to be seen.

V. THE DECREE

It is a mere matter of essay writing to put down an opinion holding that the State statutes, on which the Courts below have relied in these cases, are unconstitutional. If, however, that is the result in anything more constructive or practical than an essay followed by a century of litigation, a gigantic administrative job has to be undertaken. While our decision may invalidate existing laws and regulations governing the school, the Court cannot substitute constructive laws and regulations for their governance. Local or state or federal action will have to build the integrated school system if they are to exist.

The Department of Justice, while urging a decree condemning segregation, concedes that uniform and immediate enforcement is impossible. It points out that school districts may have to be consolidated or divided or their boundaries [20] revised and the teachers and pupils may have to be transferred. The Government points out that placing White children under Colored teachers is an essential part of the plan unless Colored teachers are to be dismissed in some areas where they have been hired in large numbers. This is one of the most controversial problems of adjustment. Financial problems are also obviously involved. In some regions the White schools are good the Negro schools poor. If both classes are to be accommodated in both schools it would require White pupils to shift to the Negro schools, a measure which is likely to be accompanied by great opposition. New facilities are necessarily to be provided and that involves taxation, the sale of bonds, and the votes of taxpayers and affirmative actions by public bodies. It is impossible to now anticipate all of the difficulties or to determine the time necessary in any particular area to overcome them.

The Government advises that we remand these cases to the District Courts under instructions to proceed with enforcement as rapidly as conditions make it appear practicable. This casts upon the lower courts a burden of continued litigation and subjects judges in the locality to local pressures and provides them with no standards to justify their decisions to their neighbors whose opinions they must resist. The Department offers us no standards [21] for practicable proceedings and none exist in the law.

It is apparent that our decision begins, it does not end, the struggle over segregation. The representatives of the Negroes point out with great force that many are denied the right to enter White schools and that it is a present and personal right to do so and that deferred relief may be a denial of rights to those pupils who meanwhile pass school age. Counsel for the States contend that if segregation is abolished at all, the process must be adapted to varying local conditions which will require time and consideration and varying periods of adjustment. They point out that in building their present administrative, educational and physical structures they have relied on the teachings of this Court and the attitudes of Congress.

That these controversies on a local basis will persist over a long period of time and require consideration in great detail is apparent.

The Government also proposes what appears to me to go far beyond the settlement of the rights of the parties to these litigations which is the limit of the judicial function as I see it. It proposes that we affirmatively direct the District Courts to obtain from the local school authorities and approve "an effective program for accomplishing transition to a non-segregated [22] system" "in passing upon such a program, the lower court could receive the views not only of the parties but of interested persons and groups in the community." It seems to me that this proposal that the District Courts supervise the educational authorities with the aid of town meetings exceeds any authority that I know of in this Court. Our sole function is to decide an existing case or controversy between the parties to the case. It seems to me that the proposal that the Court embark upon a supervised revamping of the educational system of the South proposed what is manifestly beyond judicial power or functions. Nothing has raised more doubt in my mind as to the wisdom of our decision than the character of the decree which the Government conceives to be necessary to execute it.

Questions as to the contents of a decree have been shunned by both of the parties to the contest, although neither of them accept the Government's proposals. It would obviously be inconsistent with the position of the parties to discuss the contents of a decree which would be unsatisfactory to them lest they appear to be acquiescing in it.

I favor at the moment going no farther than to enter a decree that the State statutes requiring or authorizing segregation merely on account of race or color are unconstitutional. I would order a reargument on the contents of the decree to be [23] entered and request the Government and each of the parties to submit detailed proposed decrees designed to do justice in these particular cases. I have no doubt of the power of a Court of Equity to condition its remedies to justice to both parties and I have no doubt that the circumstances under which a large part of the country has grown into this unfortunate position are such that only a considerate decree would be a just one. And in the long run I think only a reasonably considerate decree would be an expedient one for the persons it has sought to benefit hereby.

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